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THE PERILS OF UNIVERSAL ACCOMMODATION:  
THE WORKPLACE RELIGIOUS FREEDOM ACT OF  
2003 AND THE AFFIRMATIVE ACTION OF  
147,096,000 SOULS

*James A. Sonne\**

INTRODUCTION

Imagine the scene. You manage a clothing store in Columbia, South Carolina. A new employee approaches you with a request. He begins by telling you that he belongs to the "Church of the Crystal Serpent" and that, as such, he must "handle snakes" while "scrying" (gazing into a crystal ball) at regular intervals ten times a day, and have every other Friday off.<sup>1</sup> Because some "handling" intervals fall during regular work hours, he asks for relevant ten-minute breaks in which to "practice his religion." The employee also seeks to ventilate his locker (at a cost of \$300) for storing his snakes, and asks that the break room mirror be lowered (at a cost of \$150) so that, as is his religious practice, he may "lie with snakes and gaze for images of a past life." It is undisputed that there is no other way for him both to practice his religion and to work for you. Citing actual burdens that would result, such as changes to the seniority policy for scheduling shifts, efficiency losses for the breaks, coworker and customer safety

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1 This hypothetical is based upon a combination of two activities, serpent handling and scrying, that are presently justified on religious grounds. For background on the former, see THOMAS BURTON, SERPENT-HANDLING BELIEVERS *passim* (1993); for the latter, see THEODORE BESTERMAN, CRYSTAL GAZING: A STUDY IN THE HISTORY, DISTRIBUTION, THEORY AND PRACTICE OF SCRYING *passim* (photo. reprint n.d.); and see also *Van Koten v. Family Health Mgmt., Inc.*, 955 F. Supp. 898, 899 (N.D. Ill. 1997) (discussing "wicca," in which scrying is a practice, as a "religion" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2000)).

risks, and the costs associated with both the locker and mirror,<sup>2</sup> you deny his requests for accommodation. Under current law, you would almost certainly be within your rights. If the proposed Workplace Religious Freedom Act of 2003 (WRFA 2003 or "the Act")<sup>3</sup> were adopted, however, you could be liable for a civil rights violation. Are we just seeing things, or is there something in the grass?

As the hypothetical suggests, WRFA 2003 would mandate that employers indulge the religious practices of employees in a radical way. In proposing an accommodation standard hastily drawn from the Americans with Disabilities Act of 1990 (ADA),<sup>4</sup> the Act maintains an inappropriate conception of religion and its practice that results in employer burdens without precedent in employment or constitutional law. As in the ADA, the Act would require that employers bear everything short of "significant difficulty or expense" in accommodating employees,<sup>5</sup> but unlike the ADA, which contemplated coverage of a distinct minority (approximately forty-three million) defined largely through objective physical or mental limitations,<sup>6</sup> the Act could demand similar affirmative action for virtually every member of the workforce (approximately 147 million)<sup>7</sup> by an almost limitless definition of religion.<sup>8</sup> In its essence, the Act so protects religious practice to the detriment of other interests that it poses a great threat not only

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2 Although potential violations of criminal law arising from the proposed religious practice of "snake handling" might also serve as a burden, South Carolina maintains a Religious Freedom Act, S.C. CODE ANN. § 1-32-40 (Law. Co-op. 2002), which would presumably exempt this religiously motivated practice.

3 S. 893, 108th Cong. (2003).

4 42 U.S.C. § 12,101 (2000).

5 Compare *id.* § 12,111(10)(A), with S. 893 § 2(a)(4) (using similar factors to define the "significant difficulty or expense" standard of "undue hardship").

6 The ADA, which requires accommodation in employment, public services, and public accommodations, estimated its total class at "some 43,000,000 Americans" at its passage in 1990. 42 U.S.C. § 12,101(a)(1).

7 WRFA 2003, as an amendment to Title VII, would protect both applicants and employees. See S. 893 § 2(a)(4); see also 42 U.S.C. § 2000e-2(a). Therefore, it would cover anyone who does (or could) work for employers otherwise regulated by Title VII (generally, employers with fifteen or more employees). See 42 U.S.C. § 2000e(b). As of June 2003, the size of the civilian labor force in the United States was 147,096,000 people. See Press Release, Bureau of Labor Statistics, The Employment Situation: June 2003 (July 3, 2003), available at [http://www.bls.gov/schedule/archives/empsit\\_nr.htm](http://www.bls.gov/schedule/archives/empsit_nr.htm).

8 The Equal Employment Opportunity Commission (EEOC), which is the agency chiefly responsible for enforcing Title VII, defines religion "to include moral or ethical beliefs," 29 C.F.R. § 1605.1 (2003), and, perhaps rightly, does not demand an objective assessment of content. See MICHAEL WOLF ET AL., RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES 32 (1998). Yet, consequently, the total size of the civilian workforce becomes the proper measure

to the ability of business to function, but also to the ultimate understanding of individual rights within the broader community.

In addressing the threat posed by WRFA 2003, this Article proceeds in five parts. As introduction, Part I provides an overview of the Act's core errors, particularly in its understanding of religion and its practice. Part II traces the origins and development of religious accommodation in employment, from the enactment of Title VII of the Civil Rights Act of 1964 (Title VII) to the present, and, thus, sets the balance due to be upset by the Act. Part III discusses the Act's adoption of the ADA model, while Parts IV and V, respectively, analyze the massive practical and theoretical consequences for using this model for religious matters. On the whole, this Article posits that the Act advances an accommodation mandate that would severely injure the proper relationship between individual rights and the rational operation of the workplace.

## I. GREETING THE DILEMMA

In this most recent Congress, Senator Rick Santorum introduced WRFA 2003 for Senate consideration.<sup>9</sup> This legislation, which had been submitted and rejected in several earlier House or Senate versions since 1994,<sup>10</sup> would ostensibly expand federal protection for religious activity in the workplace.<sup>11</sup> The Act would achieve this through changes to Title VII, which protects against discrimination on the basis of "religion,"<sup>12</sup> and its 1972 amendment of section 701(j), which adds to this protection an employer obligation of "reasonable accommodation" for "all aspects of religious observance and practice" of employees unless it would impose an "undue hardship" on the employer.<sup>13</sup> In particular, the Act would amend Title VII by defining the previously undefined term of "undue hardship" as "requiring significant difficulty or expense."<sup>14</sup> In so doing, it would reverse deci-

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of coverage given that the adoption of protected beliefs (or practices) is, at least in theory, available to all.

9 See S. 893.

10 For earlier Senate and House versions of the Act, see S. 2572, 107th Cong. (2002); H.R. 4237, 106th Cong. (2000); S. 1668, 106th Cong. (1999); H.R. 2948, 105th Cong. (1997); S. 92, 105th Cong. (1997); S. 1124, 105th Cong. (1997); H.R. 4117, 104th Cong. (1996); S. 2071, 104th Cong. (1996); and H.R. 5233, 103d Cong. (1994).

11 See 149 CONG. REC. S5352-53 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum).

12 42 U.S.C. § 2000e-2(a)(1).

13 42 U.S.C. § 2000e(j).

14 See S. 893 § 2(a)(4).

sions by the U.S. Supreme Court interpreting the "undue hardship" requirement of section 701(j) as mandating anything more than a "de minimis" expense,<sup>15</sup> and would replace this lower threshold with the much more demanding ADA "significant difficulty or expense" standard.<sup>16</sup> The net result would be a greater burden on employers that would, according to presidential hopeful John Kerry, a co-sponsor of the Act, "help assure that employers have a meaningful obligation to reasonably accommodate their employees' religious practices."<sup>17</sup>

At first blush, the Act sounds reasonable and uncontroversial, particularly in light of the nation's increased sensitivity to religious discrimination in the wake of the events of September 11, 2001,<sup>18</sup> and the seeming religiosity of modern Americans (e.g., "nearly ninety-five percent . . . say that they believe in God or a universal spirit"<sup>19</sup>). In fact, the Senate bill is co-sponsored by such ideologically diverse senators as Hillary Clinton and Orrin Hatch.<sup>20</sup> Upon further review, however, the proposal is fraught with problems, not only for the business and employer interests that are its traditional opponents,<sup>21</sup> but for religious and government concerns as well. Moreover, although this will not be discussed directly here, due to its treatment by others and its range beyond the employment topics at hand, the Act may also face

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15 See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) ("To require [an employer] to bear more than a *de minimis* cost in order to give [an employee] Saturdays off is an undue hardship.").

16 See 42 U.S.C. § 12,111(10)(A).

17 See 149 CONG. REC. S5353 (daily ed. Apr. 11, 2003) (statement of Sen. Kerry).

18 See, e.g., U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N, QUESTIONS AND ANSWERS ABOUT EMPLOYER RESPONSIBILITIES CONCERNING THE EMPLOYMENT OF MUSLIMS, ARABS, SOUTH ASIANS, AND SIKHS 1 (2002), available at <http://www.eeoc.gov/facts/backlash-employer.html> [hereinafter EEOC] ("[R]eaction to the events of September 11, 2001 may demand increased efforts to prevent discrimination.").

19 Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 576 (2000) (citing Jeffery L. Sheler, *Spiritual America*, U.S. NEWS & WORLD REP., Apr. 4, 1994, at 48).

20 The original sponsors are Senators Brownback (R., Kan.), Clinton (D., N.Y.), Corzine (D., N.J.), Ensign (R., Nev.), Hatch (R., Utah), Kerry (D., Mass.), Lieberman (D., Conn.), Mikulski (D., Md.), Murray (D., Wash.), Santorum (R., Pa.), and Smith (R., Or.). See S. 893, 108th Cong. pmb. (2003).

21 See Kevin Eckstrom, *Bill Aimed at Protecting Faith While on the Job*, WASH. POST, May 10, 2003, at B8 ("Business lobbyists have stalled attempts to advance the bill for almost a decade.").

problems under the Establishment Clause of the First Amendment<sup>22</sup> by virtue of its special treatment of religious practice.<sup>23</sup>

Perhaps the most striking aspect of WRFA 2003, and one that has received little attention, however, lies in its understanding of religion and its practice. In its imposition of heightened accommodation requirements, the Act necessarily espouses one or both of the following views of law and religion in the workplace: (1) religiously motivated behavior, by its very nature, is involuntary and/or immutable and, therefore, must be accommodated,<sup>24</sup> at least to a "significant" degree, and/or (2) the ability to engage in religious activity is so important that, volitional or not, it is a personal right that must be accommo-

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22 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

23 See, e.g., Gregory J. Gawlik, Note, *The Politics of Religion: "Reasonable Accommodations" and the Establishment Clause: An Analysis of the Workplace Religious Freedom Act*, 47 CLEV. ST. L. REV. 249, 255–58 (1999) (discussing the test used for Establishment Clause challenges); Alan D. Schuchman, Note, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA*, 73 IND. L.J. 745, 757 (1998) ("Anytime the government takes any affirmative action in the name of religion, it is treading a thin line between what is permissible and what is a violation of the First Amendment's Establishment Clause."); see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710–11 (1985) (striking down a statute requiring Sabbath accommodation, with Justice O'Connor stressing distinctions between "reasonable accommodation" under Title VII and the *absolute* accommodation at issue). "Title VII attempts to lift a burden on religious practice that is imposed by private employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause." *Id.* at 711–12 (O'Connor, J., concurring). Although the Act's constitutionality is likely based on inferences from *Thornton*, given the Court's implicit upholding of section 701(j) in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 89–91 (1977) (Marshall, J., dissenting) (albeit on a "de minimis" level), and its approval of exemptions for religious employers under Title VII in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987), it is not clear that the Act would pass Establishment Clause scrutiny. Moreover, at least as applied to state and local employers, constitutionality would be doubtful in light of the Court's holding in *City of Boerne v. Flores*, 521 U.S. 507 (1997), restricting federal interference with neutral state or local laws affecting religion, and, as applied to nonfederal employers, there is also a tenuous argument that "Congress cannot show that the failure to make religious accommodations 'substantially affects' interstate commerce." See Roger Clegg, *Praying on the Job*, LEGAL TIMES, June 9, 2003, at 58, 59. But see Richard T. Foltin & James D. Standish, *Your Job or Your Faith?*, LEGAL TIMES, July 21, 2003, at 36 (arguing that WRFA 2003 is constitutional).

24 See generally John H. Garvey, *Free Exercise and the Value of Religious Liberty*, 18 CONN. L. REV. 779, 798–801 (1986) (discussing what he calls both the "cognitive" and "volitional" aspects of religious exercise that potentially render it something over which "there is no question of a choice").

dated.<sup>25</sup> Regardless of which view is offered, both are flawed. The first, which could be referred to as an “irresistible impulse” or “immutability” theory, mandates a view of religion and religious practice that is not only open to dispute, but that also unduly imposes the cost of its debatable conclusion on others. The second, which could be called the “personal rights” theory, ignores relevant state interests and the fundamental distinction between state and private action for purposes of religious freedom, and, again, imposes the cost on others.<sup>26</sup> Remember, the question is not discrimination because of religious status or belief per se, which might serve as a sensible basis for protection, particularly given its often-perceived connection to race and/or national origin, as well as the lack of any demand for affirmative employer action.<sup>27</sup> Rather, the issue is the legally mandated accommodation by employers of employee actions purportedly motivated by religious belief, including ones that might otherwise hinder the performance of an employee’s job or the employer’s business,<sup>28</sup> such as “the handling of serpents.”

In offering an “irresistible impulse” view of religious practice, the Act would certainly be neither new nor alone. Indeed, one could argue that this view was central, intentionally or not, to the 1972 amendment by its definition of “religion” as including “observance and practice.”<sup>29</sup> Yet, the theory has been limited in practice by the Supreme Court’s “de minimis” test.<sup>30</sup> Thus, its proposed extension (or re-affirmation) by the Act would expose religious action accommodation for what it is—a policy choice antithetical to the “prejudice” model of discrimination law.<sup>31</sup> Indeed, in equating religious action

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25 See SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 604–05 (2000).

26 Even leaving overall constitutionality aside, in light of *City of Boerne*, 521 U.S. at 530, the burdens on private employers under the Act might be even greater than those of at least the state or local governmental employers otherwise covered. See 42 U.S.C. § 2000e(b) (2000); *infra* note 35.

27 Indeed, even the 1972 Amendment considers “belief” its own category. See 42 U.S.C. § 2000e(j). As discussed in Part V.A below, the belief/status category is a sound basis for employers, employees, and courts to balance job performance and believer invasiveness on a proper antidiscrimination principle.

28 See Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1200 (2003) (noting that job performance is nondispositive in assessing accommodation).

29 See 42 U.S.C. § 2000e(j).

30 Indeed, some, like Justice Marshall, challenge the *Trans World Airlines, Inc. v. Hardison* holding as “a fatal blow” to Congress’s effort to accommodate religion. See 432 U.S. 63, 86 (1977) (Marshall, J., dissenting).

31 Professor Christine Jolls has commented that, unlike “accommodation” provisions, “[t]he canonical idea of ‘antidiscrimination’ in the United States condemns the

with the categories otherwise protected by such laws (e.g., race, gender, disability), and then imposing a further burden of affirmative action up to "significant difficulty," the Act betrays, in one way or the other, the very meaning of discrimination as it has been largely understood in this context—different treatment of, or impact on, similarly situated employees based on immutable factors unrelated to performance.<sup>32</sup> Act supporters might argue that religious activity is irresistible, involuntary, or immutable, but the lack (or potential impossibility) of agreement on the matter makes highly suspect the inclusion of such activity among the list of protected categories and, even more, an imposition on others as a result.<sup>33</sup> It should also be noted that in adopting this approach to religion, the Act contradicts the overwhelming emphasis on choice and neutrality in analogous

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differential treatment of otherwise similarly situated individuals on the basis of race, sex, national origin, or other protected characteristics." Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643 (2001) (citing Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 9–12 (2000)).

32 The Court asserted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), that "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." *Id.* at 431. In light of this, Professor Karen Engle notes that by "requiring, at least in certain instances, that employees who claim the need for religious accommodation be treated differently from other employees, Title VII's religious accommodation provision poses a challenge to the liberal, or neutral, ideology embedded in the interpretation of the remainder of the statute." Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 320 (1997). Thus, "employees claiming to have been discriminated against on the basis of their religious beliefs and practices actually receive *more* favorable treatment than other classes of employees protected by Title VII . . ." Michael D. Moberly, *Bad News for Those Proclaiming the Good News?: The Employer's Ambiguous Duty to Accommodate Religious Proselytizing*, 42 SANTA CLARA L. REV. 1, 3 (2001) (emphasis added).

33 As the Fifth Circuit opined in *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), "[s]ave for religion, the discriminations on which the Act focuses its laser of prohibition are those that are either beyond the victim's power to alter . . . or that impose a burden on an employee on one of the prohibited bases." *Id.* at 269. Professor Steven Jamar suggests further, "[d]iscrimination based on belief is different from that based upon birthright because beliefs and concepts are a matter of choice." Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 727 (1996). Continuing, he argues that religious discrimination is based not upon an unavoidable status which is an accident of birth such as race, color, sex, or national origin, or the result of natural processes such as aging or the result of disability whether congenital or the result of some post-natal illness or trauma; it is based on choice . . . [t]hat is, people can choose what to believe and can change their beliefs.

*Id.* at 747.



constitutional church-state jurisprudence and its corresponding withdrawal from disparate impact theory in approving neutral, generally applicable state action.<sup>34</sup> What is good enough for the state (at least constitutionally)<sup>35</sup> should be good enough for employers.

Alternatively, to the extent the Act reflects a "personal rights" theory (regardless of mutability or volition), this theory would both ignore the role of relevant state interests and blur the difference between state and private action for "religious freedom" purposes. It is certainly true that other volitional acts, such as collective labor, jury duty, military service, or whistleblowing, yield personal rights and protections under federal law,<sup>36</sup> but not only are these other acts rooted

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34 See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002) (approving participation of religious schools in a state voucher program based, in large part, on the fact that use of the vouchers was a matter of parental choice, not state action); see also *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (approving the denial of unemployment benefits to an employee terminated for smoking peyote, despite his religious motivations, based on the neutrality and general applicability of the relevant law).

35 As an amendment to Title VII, WRFA 2003 would, as a statutory matter, apply to covered governmental employers. See 42 U.S.C. §§ 2000e(b), 2000e-16 (2000). Yet, constitutionally, its use of a heightened test for such employers is seemingly inconsistent with the Supreme Court's preference for neutrality and nonendorsement. Cf. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 116–18 (2001) (contrasting neutrality and endorsement in approving mere access to a public facility). More specifically, as to state and local entities, constitutionality is in even greater doubt given the holding in *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997), that Congress exceeded its powers in mandating exemptions to neutral state laws of general application in the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb. Further, on the federal level, it should be noted that WRFA 2003 would go even further than RFRA, whose "compelling interest" test for federal acts that "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" most likely does not apply to federal job rules. 42 U.S.C. § 2000bb-1; see Sidney A. Rosenzweig, Comment, *Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation*, 144 U. PA. L. REV. 2513, 2526 (1996) (citing S. REP. NO. 103-111, at 13 (1993), for the notion that RFRA shall not "be construed as affecting religious accommodation under Title VII of the Civil Rights Act of 1964"). Although the White House *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* increased accommodation in a manner similar to the Act for some federal workers, these are a mere "policy statement" with no independent force of law. WOLF ET AL., *supra* note 8, at 8 (citing Press Release, White House Office of the Press Secretary, *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* app. H (Aug 14, 1997), available at <http://clinton4.nara.gov/textonly/WH/New/html/19970819-3275.html>).

36 See National Labor Relations Act, 29 U.S.C. § 158(a)(3) (2000) (for collective labor action); Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4311-4319 (2000) (for military service); Jury Systems Improvement Act, 28 U.S.C. § 1875 (2000) (for jury duty). For an example of Title VII

in stronger links to greater state interests,<sup>37</sup> they also do not generally mandate the same degree of accommodation required by the Act.<sup>38</sup> With mandatory accommodation, religious freedom is not really free, but rather is charged to the accommodator. In fact, in requiring such a high level of accommodation at present, the Act would impose an even greater burden on employers already struggling in an uncertain economy, a struggle that naturally (and directly) impacts labor generally.<sup>39</sup>

Furthermore, the “personal rights” theory would also unduly insulate religion from the dialogue between individual choices and the marketplace of ideas—a traditional hallmark of religious liberty.<sup>40</sup> In light of this tradition, Senator Jennings Randolph was in error when he stated in offering the 1972 Amendment that “it carries through the spirit of religious freedom under the Constitution of the United States.”<sup>41</sup> Indeed, that “spirit” did not take hold in employment in any significant way until Title VII itself, and until 1972 it never carried with it any prevailing notion of accommodation.<sup>42</sup> The “spirit of relig-

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retaliation protections for whistleblowing, see 42 U.S.C. § 2000e-3, and see also JAMES O. CASTAGNERA ET AL., *TERMINATION OF EMPLOYMENT* ¶¶ 10,301–10,307 (2002) (discussing bans on termination resulting from employees’ actions).

37 As described in Part V.B, these interests include, for jury duty, the “maintenance and independence of the judicial system,” CASTAGNERA ET AL., *supra* note 36, ¶ 10,302 (quoting *Lucas v. Matlack, Inc.*, 851 F. Supp. 225, 228 (N.D. W. Va. 1993)), and for collective labor action, the “industrial peace.” *NLRB v. Americare-New Lexington Health Care Ctr.*, 124 F.3d 753, 758 (6th Cir. 1997).

38 As described in Part V.B, of the provisions addressed, only USERRA requires accommodation on a level similar to that proposed by WRFA 2003. See 38 U.S.C. § 4312(d)(1) (detailing the exceptions for reemployment).

39 See Gretchen Morgenson, *War Rally Loses Sight of Deeper Risks*, N.Y. TIMES, Mar. 23, 2003, § 3, at 1 (discussing the modern economy in light of relevant global conflicts and recessionary trends, and noting that notwithstanding the expected “emotional rally” from the war with Iraq, “corporate spending remains moribund, consumers are nervous, and layoffs keep coming”).

40 See William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 10–19 (1995).

41 118 CONG. REC. 706 (1972). Indeed, in his remarks, Senator Randolph stated even further that “I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended.” *Id.* Perhaps more pertinently, Senator Randolph’s approach is echoed by Senator Santorum in his assertion, in introducing WRFA 2003, that the bill involves the “first freedom,” that is, “freedom to exercise one’s religion according to the dictates of . . . religious conscience.” 149 CONG. REC. S5353 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum).

42 See Russell S. Post, *The Serpentine Wall and the Serpent’s Tongue: Rethinking the Religious Harassment Debate*, 83 VA. L. REV. 177, 180–81 (1977) (noting that the scant legislative history behind Title VII “suggests that religion was included in Title VII as

ious freedom" is undoubtedly central to the constitutional system, but that concerns state, not private, action.<sup>43</sup> Finally, to suspend religion from debate, discourse, or even difficulty, in the manner proposed by the Act is not authentic freedom, but an atrophic enabling that is harmful not only to legal and market systems, but also to the vitality of religion itself.<sup>44</sup>

Neither the foregoing nor the remainder of this Article is intended to suggest that there is no role for *voluntary* accommodation by employers of the religious practices of their employees, nor is there any intention to pass judgment on any particular beliefs or practices. To the contrary, voluntary action is to be encouraged of any employer interested in an efficient and content workforce, particularly given the current religious climate in America, and may, depending on one's particular perspective, even be a moral imperative.<sup>45</sup> Even Act spon-

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boilerplate language to ensure uniformity of the anti-discrimination principle, not as a function of any compelling policy rationale").

43 Leaving federal employers aside, it is generally accepted that the constitutional source of power for the regulation of religious practices at work is the Commerce Clause, not the First or Fourteenth Amendments. As the Court stated in *United Steelworkers v. Weber*, 443 U.S. 193 (1979): "Title VII . . . was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." *Id.* at 206 n.6. Thus, given the lack of state action, there is no additional source of power from the First Amendment, either independently or via the Fourteenth. Indeed, both the First and Fourteenth, by their very language, generally single out state, not private, action as their target. See U.S. CONST. amend. I ("Congress shall make no law . . ."); *id.* amend. XIV ("No state shall . . ."); see also *Endres v. Ind. State Police*, 334 F.3d 618, 630 (7th Cir. 2003) ("This means that § 701(j) [of the Civil Rights Act of 1964] rests on the commerce clause alone . . . [and] may not be used to compel a State to defend in federal court a private suit seeking accommodation of a religious practice."); Harry T. Edwards & Joel H. Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 603 (1971) (confirming that both amendments "protect the individual's religious freedom against infringement only by governmental, not private, action" and that "the reference to religious discrimination in Title VII plainly was not intended to be a restatement of the substantive constitutional right; rather, the Civil Rights Act is grounded in Congress' regulatory power under the commerce clause of the Constitution"). Finally, Senator Kerry, in his comments introducing WRFA 2003 itself, expressly states that the Act does not "substantively expand 14th Amendment rights." 149 CONG. REC. S5353 (daily ed. Apr. 11, 2003) (statement of Sen. Kerry).

44 Cf. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1459 (2d ed. 1991) (discussing limitations on government interference in religious affairs and "competition among sects" as an influential notion in the constitutional context) (citing LAURENCE H. TRIBE, CONSTITUTIONAL LAW 1158-60 (2d ed. 1988)).

45 Cf. Marianne C. DelPo, *Never on Sunday: Workplace Religious Freedom in the New Millennium*, 51 ME. L. REV. 341, 342 (1999) (discussing the sensitivity of employers); Clegg, *supra* note 23, at 58-59 (discussing the economic incentive role).

sor Senator Santorum admitted that “most private employers” voluntarily accommodate their employees’ religious practices, and that “[i]n this land of religious freedom, one would hope that employers would spontaneously accommodate the religious needs of their employees whenever reasonable.”<sup>46</sup> Senator Randolph shared these sentiments in 1972, when he noted that the need for mandating accommodation would only arise “in perhaps a very, very small percentage of cases,” given “that usually the persons on both sides of this situation, the employer and the employee, are of an understanding frame of mind and heart.”<sup>47</sup> Whether it is the wearing of ashes, observing the Sabbath, or snake handling, employers who, in their judgment, wish to accommodate should certainly be encouraged and free to do so.<sup>48</sup> The question is the role of the state and the answer, as it is in the constitutional arena, should be equal and neutral treatment.

## II. THE DEVELOPMENT OF RELIGIOUS ACCOMMODATION

### A. *Origins*

Title VII of the Civil Rights Act of 1964, as originally enacted, provides, in pertinent part, as follows:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .<sup>49</sup>

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46 149 CONG. REC. S5352 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum).

47 118 CONG. REC. 706 (1972).

48 Even absent any accommodation mandate, to the extent that employers base refusals to accommodate a religious practice purely on the religious status of the action to be performed, they would still be liable under the nondiscrimination (i.e., “disparate treatment”) provisions of Title VII generally. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (discussing discriminatory purpose and discriminatory consequences). Indeed, this was the approach of most courts prior to section 701(j)’s amendment. As Professor Engle points out, the approach at that time was:

An employer may not refuse to employ or discharge any person because of his religious beliefs, but surely the great and diversified types of American business cannot be expected to accede to the wishes of every doctrine or religious belief . . . . [d]iscrimination against individuals on the basis of religion would therefore only mean making employment decisions based on religious beliefs.

Engle, *supra* note 32, at 365–66 (citations and quotations omitted); see also Jolls, *supra* note 31, at 648–49 (discussing the discrimination/accommodation distinction).

49 Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255–57 (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2000)).

There is little question that the primary goal of the 1964 Act was the proscription of race discrimination.<sup>50</sup> However, in an effort to cover other forms of "status" prejudice, it was expanded to cover such other clearly immutable characteristics as sex, color, and national origin.<sup>51</sup> More importantly for our purposes, it also provided protection for religion. Interestingly enough, though, there is little in the way of legislative history to determine whether Congress considered religion an immutable characteristic,<sup>52</sup> whether it was singled out for protection based on its historical importance in the constitutional context,<sup>53</sup> or for some other reason. In fact, according to some scholars, Congress included religion among the prohibited forms of discrimination "without bothering seriously to consider or to document the problem."<sup>54</sup> In any event, religion's inclusion enshrined it as something beyond the reach of employers in making relevant workplace decisions and, in so doing, equated it with other indisputably immutable characteristics, such as race or sex, at least for the purpose of legal protection.<sup>55</sup>

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50 See, e.g., H.R. REP. NO. 88-914, pt. 2, at 29 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2516 (reporting comments by Rep. McColluch and others that Title VII's "primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification"); see also *id.* pt. 1, at 18, *reprinted in* 1964 U.S.C.C.A.N. at 2393 (stating that the "[m]ost glaring [discrimination], however, is the discrimination against Negroes which exists throughout the Nation").

51 The Fifth Circuit noted in *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975), that

[e]qual employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for men and another for women if the distinction is based on some fundamental right.

*Id.* at 1091; see also *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) (noting the unique protection afforded to religion in employment as a mutable characteristic).

52 See *Jamar*, *supra* note 33, at 741 ("Although the legislative history is not helpful on this point, it is probable that religion was originally seen as a status, like race or sex, and the problem of discrimination based upon belief or religious needs was not well thought through.").

53 See *Edwards & Kaplan*, *supra* note 43, at 600-02 (citing constitutional "religious freedom" motivations).

54 *Id.* at 600; see also *Post*, *supra* note 42, at 180-81 (noting that legislative history is "deeply ambiguous" and its "pervasive silence suggests" no "compelling policy rationale").

55 Lawrence Lorber, an employment lawyer with the firm of Proskauer Rose, LLP, recently summarized the rather conclusory approach to the original inclusion of "religion" in Title VII as follows: "[W]hen Title VII was passed, the religious discrimination provision was not a very exceptional provision . . . [t]he notion was that certainly

The mere religious beliefs (or status) of an individual may very well serve as a sensible boundary for a prejudice-targeted discrimination law, particularly given its common connection with race or national origin and the seemingly appropriate reluctance of the law to question the mere beliefs of a person.<sup>56</sup> The 1964 Act was amended in 1972, however, to go beyond status and into action—largely in an effort to rescue by legislation relevant interpretive regulations issued by the Equal Employment Opportunity Commission (EEOC), Title VII's enforcement agency, that tried in both 1966 and 1967, in varying degrees and with mixed results, to do just that.<sup>57</sup> The 1972 amendment altered the scope of the 1964 Act by expanding its protection of "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."<sup>58</sup>

Thus, whether the original protection of religious status was rooted in an "irresistible impulse" or a personal rights theory, its expansion into religious practice carried, rather significantly, either one (or both) of these theories outside the boundary of prejudicial treatment and into the arena of special consideration and mandatory affirmative action.<sup>59</sup>

Again, according to the chief sponsor of the 1972 amendment, Senator Randolph, religion should encompass "the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act."<sup>60</sup> Senator Randolph's statement, however, not only misses the critical distinction between state and private action, it also ignores the fact that religion

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in our diverse country, people should not be denied employment because of their religion." Lawrence Lorber, *Reconciling Obligations: Accommodating Religious Practice on the Job*, Comments at the Pew Forum on Religion and Public Life Conference (May 21, 2002) (transcript on file with author). However, as Lorber pointed out, "the issue then became . . . what do you do." *Id.*

56 See *WOLF ET AL.*, *supra* note 8, at 33 ("As the Seventh Circuit Court of Appeals has stated, it is improper for the courts to decide 'whether a particular practice is or is not required by the tenets of [a] religion.'" (citing *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978)).

57 See *Riley v. Bendix Corp.*, 464 F.2d 1113, 1117 (5th Cir. 1972) (noting the confirmation effect of the 1972 amendments of section 701(j) to the 1966 and 1967 EEOC guidelines, and holding that the nondiscrimination duty of an employer includes an obligation "to accommodate the reasonable religious needs of employees").

58 42 U.S.C. § 2000e(j) (2000).

59 See Moberly, *supra* note 32, at 3.

60 118 CONG. REC. 705 (1972).

under the 1972 amendment, by including accommodation requirements, is not the same "concept" as religion under the First Amendment.<sup>61</sup> As the Seventh Circuit recently opined in this context, "[l]ogic does not furnish what history lacks."<sup>62</sup> This discrepancy is made even more apparent by the Supreme Court's refusal to expand affirmative accommodation under the First Amendment in light of neutral, generally applicable laws,<sup>63</sup> and, indeed, in the Act's own proposal of an unprecedented increase of accommodation under Title VII itself.<sup>64</sup>

In defining religious practices under section 701(j), the EEOC published the following interpretative guidance in 1980:

[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. . . . The fact that no religious group espouses such beliefs or the fact the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices . . . .<sup>65</sup>

Turning to the religious practice arena, the EEOC went even further in 1989 in asserting that "[o]nly the individual can determine whether his absence from work is required in order to attend a relig-

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61 Although section 701(j) of Title VII and WRFA 2003 might otherwise be constitutional, their principle of accommodation of religious practices (as opposed to other types of practices), *see* 42 U.S.C. § 2000e(j); S. 893, 108th Cong. § 2(a)(4) (2003), is at least theoretically distinct from the Supreme Court's emphasis on state neutrality in the constitutional arena. *See* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (construing the Establishment Clause); *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) (construing the Free Exercise Clause); *see also* *Endres v. Ind. State Police*, 334 F.3d 618, 630 (7th Cir. 2003) (noting that Title VII's "accommodation requirement does not reinforce the constitutional approach; to the contrary, neutrality (which is both necessary to avoid disparate treatment and, under *Smith*, sufficient to avoid any violation) differs substantially from accommodation [in that n]eutrality is blind to religion" and that "accommodation requires consciousness of religion and entails a demand that believers and non-believers receive different treatment").

62 *Endres*, 334 F.3d at 360.

63 *See Smith*, 494 U.S. at 879; *cf. Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (upholding the U.S. Air Force's application of a neutral ban on the wearing of "headgear" indoors to prohibit the wearing of a yarmulke by an Orthodox Jewish officer).

64 *See* S. 893 § 2.

65 29 C.F.R. § 1605.1 (2003).

ious observance.”<sup>66</sup> Thus, not only are the practices isolated for protection and accommodation, but also the inquiry into their motivation and validity is expanded beyond traditional notions of religion to moral and ethical practices. Although this expansion has been limited somewhat by the courts, the position taken by the EEOC is extremely influential, particularly with a cautious employer. Furthermore, the fact that courts are generally reluctant to put plaintiffs to the test over the “religious” nature of their beliefs<sup>67</sup> renders the EEOC’s position all the more significant.

*B. Back to the Future: Section 701(j)*

Again, Title VII, as originally enacted in 1964, only prohibited discrimination “because of . . . religion,” without any reference to employer accommodation, reasonable or otherwise.<sup>68</sup> As the Sixth Circuit concluded in its 1970 decision of *Dewey v. Reynolds Metals Co.*,<sup>69</sup> a case that was shortly thereafter affirmed by an equally divided U.S. Supreme Court,

[t]he legislative history of the Act expresses a clear Congressional intent to inhibit only discrimination against an individual because of his race, color, religion, sex or national origin. The plain language of the statute, Section 2000e-2(a) of Title 42, is susceptible of no other meaning. Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another.<sup>70</sup>

As described above, the EEOC published “Religious Discrimination Guidelines” in 1966 and 1967, the latter of the two stating that “the duty not to discriminate on religious grounds” under Title VII requires the employer to “make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the con-

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66 WOLF ET AL., *supra* note 8, at 33 (quoting *Cardona v. Frank*, Nos. 01882012, 01882013, 1989 WL 1003917, at \*3 (E.E.O.C. Oct. 11, 1989)).

67 *See id.* at 29.

68 Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255-57 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2000)).

69 429 F.2d 324 (6th Cir. 1970), *aff’d*, 402 U.S. 689 (1971) (per curiam) (upholding the termination of an employee for his refusal to find a replacement for work on his Sabbath). The language concerning accommodation is effectively dicta given the fact that the court held that even if “reasonable accommodation” were required, the employer had provided it. *See id.* at 331.

70 *Id.* at 334.



duct of the employer's business."<sup>71</sup> These guidelines, though not in effect during the actions in *Dewey*, were nevertheless undercut by its overarching theme, namely that antidiscrimination principles do not necessarily yield accommodation duties.<sup>72</sup> Indeed, it was this theme from *Dewey* that prompted Congress, by means of the section 701(j) amendment, to attempt to "resolve by legislation" this dichotomy.<sup>73</sup>

The pre-1972 jurisprudence is also reflected in the federal district court decision of *Riley v. Bendix Corp.*,<sup>74</sup> where the court confronted a religious discrimination claim by a Seventh-Day Adventist arising out of his termination for refusing to work during his Sabbath hours. Although later reversed by the Fifth Circuit in light of the subsequent amendment of Title VII through section 701(j),<sup>75</sup> the district court in *Riley* held that the nondiscrimination provisions of the 1964 Act did not require an employer to accommodate affirmatively the religious practices of employees, notwithstanding the intervening EEOC guidelines.<sup>76</sup> In rejecting the EEOC's guidelines, the district court stated that "it would be unreasonable and impractical to require the complex American business structure to prove why it cannot gear itself to the 'varied religious practices of the American people.'"<sup>77</sup> Instead,

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71 29 C.F.R. § 1605.1 (1968) (effective July 10, 1967). The earlier version of the guideline, which imposed an arguably lighter burden (i.e., a duty "to accommodate to the reasonable religious needs of employees . . . where such accommodation can be made without *serious inconvenience* to the conduct of the business") (emphasis added), was effective June 15, 1966, and was essentially replaced by this 1967 guideline. *Id.*

72 Although Professor Jolls's questioning of the degree to which accommodation is not already subsumed in the actual effect of antidiscrimination laws as envisioned by Title VII as a whole is well taken, the distinction in the religion area is made clear by the efforts of Congress to amend the statute in 1972, and potentially again through WRFA 2003, to address this very point. See Jolls, *supra* note 31, at 645.

73 118 CONG. REC. 706 (1972). As Professor Engle notes:

Indeed, Congress chose to amend Title VII only after the Supreme Court affirmed—by an equally divided court and without opinion—a circuit court's opinion suggesting that Title VII's proscription of discrimination based on religion meant that employers could not discriminate on the basis of religious *status* or *belief* but could discriminate on the basis of religious *observance*.

Engle, *supra* note 32, at 362 (emphasis added).

74 330 F. Supp. 583, 584 (M.D. Fla. 1971).

75 See *Riley v. Bendix Corp.*, 464 F.2d 1113, 1117 (5th Cir. 1972).

76 See *Riley*, 330 F. Supp. at 588–90.

77 *Id.* at 588–89 (quoting the 1967 EEOC Guidelines, 29 C.F.R. § 1605.1(d) (1968)). The nonaccommodation approach of the Court in *Riley* seems to be supported by the legislative history of the 1964 Act in that "the discussion of religious discrimination [in the Congressional debates over the 1964 Act] was not broadened to include problems such as work assignments that conflict with religious holidays." Edwards & Kaplan, *supra* note 43, at 602 n.10.

the court took a neutrality approach wherein “[a]n employer may not refuse to employ or discharge any person because of his religious beliefs, but surely the great and diversified types of American business cannot be expected to accede to the wishes of every doctrine or religious belief.”<sup>78</sup> Thus, the court, while affirming the principle of neutral treatment of belief, refused to interpret such a principle to include the affirmative accommodation of religious practice.

In response to the approach taken by decisions such as those of the Sixth Circuit in *Dewey* and the district court in *Riley*, Senator Randolph, a Seventh-Day Baptist from West Virginia,<sup>79</sup> introduced the proposed amendment of section 701(j) as follows:

I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination [i.e., *Dewey*], divided evenly on the question.

This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it is needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole area of employment, of course are matters that were not always understood by those who led our Nation in earlier days.<sup>80</sup>

The amendment passed unanimously in the Senate, with “similar approval” in the House.<sup>81</sup>

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78 *Riley*, 330 F. Supp. at 590.

79 See 118 CONG. REC. 705 (1972) (discussing Senator Randolph’s religious affiliation). As Professor Stephen Carter has noted, “religious organizations were among the strongest supporters of the Civil Rights Act of 1964, which outlawed discrimination in employment and public accommodations.” STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 228 (1993). Similarly, as Gregory Baxter has observed of an earlier version of WRFA 2003, it is “primarily religious groups [who] support the WRFA” as well. Gregory M. Baxter, Note, *Employers Beware: The Workplace Religious Freedom Act of 2000*, 2 RUTGERS J.L. & RELIGION 6 ¶¶ 3–4 (2000); see also 149 CONG. REC. S5352–53 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum) (listing various religious groups in support of WRFA 2003). The narrative in this footnote is provided more as a point of information than to draw any particular conclusion.

80 118 CONG. REC. 705–06 (1972).

81 *Riley v. Bendix Corp.*, 464 F.2d 1113, 1117 (5th Cir. 1972).

Although the congressional support for section 701(j) is beyond doubt, the scant record of legislative history on the amendment yielded significant uncertainty as to its exact meaning, a fate seemingly shared by the inclusion of religion in the 1964 Act in the first place. As the Supreme Court noted five years after the amendment of section 701(j) in *Trans World Airlines, Inc. v. Hardison*, Senator Randolph, whose views form the bulk of the otherwise limited congressional record on the amendment of section 701(j), "expressed his general desire 'to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law' . . . but he made no attempt to define the precise circumstances under which the 'reasonable accommodation' requirement would be applied."<sup>82</sup> The Court commented further that the EEOC had similarly failed, through its 1967 guidelines effectively ratified by Congress in its amendment of section 701(j), to define the specific parameters of this duty.<sup>83</sup> The Court stated, "the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines."<sup>84</sup>

Lacking a statutory definition, the lower courts struggled.<sup>85</sup> For example, in the 1975 case of *Cummins v. Parker Seal Co.*,<sup>86</sup> the Sixth Circuit held that lowered employee morale and discontent did not create an "undue hardship" in accommodating a Sabbath observance by forced shift substitution. In so ruling, the court cited the EEOC, stating that such discontent might pose an "undue hardship" if the employer can show it would "produce 'chaotic personnel problems.'"<sup>87</sup> On the other hand, in the 1974 case of *Johnson v. U.S. Postal Service*,<sup>88</sup> the Fifth Circuit held that a forced shift substitution of a postal clerk would, in fact, create an "undue hardship" under the 1967 EEOC guidelines (that were later affirmed by section 701(j)). The court concluded that "[t]o accept [the employee's] demands

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82 432 U.S. 63, 75 (1977) (quoting 118 CONG. REC. 705 (1972)).

83 See *id.* at 75 n.9.

84 *Id.* at 75.

85 As the Court observed in *Hardison*, "[c]ases decided by the Courts of Appeals since the enactment of the 1972 amendments to Title VII . . . provide us with little guidance as to the scope of the employer's obligation." *Id.* at 75 n.10.

86 516 F.2d 544, 550 (6th Cir. 1975).

87 *Id.* (citing EEOC Decision No. 72-0606 (Dec. 22, 1971), CCH EEOC Dec. ¶ 6310, at 4555 (1972); EEOC Decision No. 71-463 (Nov. 13, 1970), CCH EEOC Dec. ¶ 6206, at 4350 (1972)); accord *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir. 1975) (citing the same EEOC cases).

88 497 F.2d 128, 130 (5th Cir. 1974).

would result in an undue hardship on the effective operation of the . . . post office. The Post Master clearly needed a person in [the employee's] position who was truly a flexible employee, available whenever needed."<sup>89</sup> Thus, the jurisprudence immediately following the adoption of section 701(j) seemed prime for clarification—and then along came Larry Hardison.

C. *Charting Messina: Hardison and Philbrook*

Larry Hardison was a supply clerk for Trans World Airlines (TWA) at its Kansas City, Missouri maintenance facility.<sup>90</sup> Though evidently not particularly religious at the time of his hiring, Hardison converted to the Worldwide Church of God one year later.<sup>91</sup> One of the "tenets of the religion" of this church is a Saturday Sabbath (from sundown Friday to sundown Saturday) for which TWA was not willing to accommodate by imposing an involuntary shift change, given that this accommodation would have, in turn, violated a certain seniority provision of the collective bargaining agreement.<sup>92</sup> Although TWA was willing to assist in a voluntary shift swap, explore other jobs within the company, and seek union acquiescence to a seniority exception, it was unwilling to violate the collective bargaining agreement.<sup>93</sup> Upon the union's refusal to acquiesce, the end result was Hardison's termination for failure to report to work during his Sabbath.<sup>94</sup>

The district court ruled in favor of the employer (and the union), holding that it "satisfied its 'reasonable accommodations' obligation, and any further accommodation would have worked an undue hardship on the company."<sup>95</sup> In affirming this lower court ruling, the U.S. Supreme Court held that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."<sup>96</sup> Among the anticipated "costs" the Court cited were breach of the seniority system and/or the payment of premium wages to a Saturday replacement.<sup>97</sup> Moreover, any such alterations to TWA's then current system would necessarily result in different (i.e., discriminatory)

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89 *Id.*

90 *See Hardison*, 432 U.S. at 66.

91 *See id.* at 67.

92 *Id.* at 68.

93 *Hardison v. Trans World Airlines, Inc.*, 375 F. Supp. 877, 888–89 (W.D. Mo. 1974).

94 *See Hardison*, 432 U.S. at 69.

95 *Id.* at 70; *see also Hardison*, 375 F. Supp. at 891 (discussing TWA's choices for further accommodation).

96 *Hardison*, 432 U.S. at 84 (citation omitted).

97 *Id.*

treatment of nonreligiously motivated shift and/or job preferences.<sup>98</sup> In reference to this inevitable consequence, the Court stated that “[i]n the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.”<sup>99</sup>

Having established the “de minimis” parameters of the “undue hardship” limit in the 1977 *Hardison* case, the Court then proceeded to delineate the “reasonableness” of the employer’s accommodation duty in its 1986 decision in *Ansonia Board of Education v. Philbrook*.<sup>100</sup> That case concerned an employee’s (Ronald Philbrook) request for paid leave for certain Worldwide Church of God Sabbath observances that were beyond what was otherwise provided in the collective bargaining agreement.<sup>101</sup> The contract provided paid leave for a list of specified purposes, including three days for “mandated religious observance.”<sup>102</sup> The agreement also offered three more days of paid leave for “necessary personal business,” which Philbrook’s employer interpreted as “necessary and essential” to “family or personal life,” but which, under the contract, could not include any reasons otherwise listed therein—e.g., a “mandated religious observance.”<sup>103</sup> Thus, upon his exhaustion of three observance days, Philbrook could only take unpaid leave for any further days taken for such purposes, something his employer permitted him to do.<sup>104</sup> Philbrook sought a modification to the restriction on “necessary personal business” paid leave or, in the alternative, paid leave reduced by the cost of a relevant substitute, but his employer rejected both of these proposals.<sup>105</sup>

Although the Supreme Court in *Philbrook* remanded the case to ensure that the employer had interpreted “necessary personal business” in a consistent manner that did not discriminate against such business if religious in nature (though not a “mandatory observance”)—and the lower courts so found<sup>106</sup>—it otherwise upheld the employer’s actions.<sup>107</sup> In so doing, the Court held that the policy “requiring respondent to take unpaid leave for holy day observance that

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98 *Id.* at 84–85.

99 *Id.* at 85.

100 479 U.S. 60, 66–68 (1986).

101 *See id.* at 62–65.

102 *Philbrook v. Ansonia Bd. of Educ.*, 925 F.2d 47, 49 (2d Cir. 1991).

103 *Id.* at 52.

104 *Id.* at 50.

105 *See Philbrook*, 479 U.S. at 64–65.

106 *See Philbrook*, 925 F.2d at 54.

107 *See Philbrook*, 479 U.S. at 69–71.

exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one.”<sup>108</sup> The Court rejected the holding of the Second Circuit and similar EEOC guidance that if multiple “reasonable” (i.e., conflict-resolving) accommodations exist, the employee’s preference governs, subject to the “undue burden” limit.<sup>109</sup> Instead, the Court stated that “an employer has met its obligations under [section] 701(j) when it demonstrates that it has offered a reasonable accommodation,”<sup>110</sup> and “[t]o the extent that the [EEOC] guideline, like the approach of the court of appeals, requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute.”<sup>111</sup>

In the lower courts, reaction to *Hardison* and *Philbrook* has been mixed, although certain themes may be gleaned from the cases. From *Hardison* and *Philbrook*, employers are given a rather clear, albeit limited, mandate—you must resolve all conflicts between an employee’s religious practice and your policies unless doing so would pose more than a “de minimis” cost. Thus, a “reasonable” accommodation is one that “eliminates the conflict between employment requirements and religious practices.”<sup>112</sup> Examples may include voluntary shift swaps, unpaid leave (if any paid leave denials are otherwise nondiscriminatory), job transfers, or grooming exemptions, but would not include partial changes to any of the foregoing that fail to resolve the conflict(s).<sup>113</sup> And, an “undue hardship” is any accommodation, whether reasonable or not, that would cost the employer something beyond

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108 *Id.* at 70.

109 *See id.* at 67–70. For the relevant EEOC guidelines, see 29 C.F.R. § 1605.2(c)(2)(ii) (1986).

110 *Philbrook*, 479 U.S. at 69.

111 *Id.* at 69 n.6.

112 *Id.* at 70.

113 *See, e.g., id.* at 70 (unpaid leave); *Cosme v. Henderson*, 287 F.3d 152, 159 (2d Cir. 2002) (job transfer); *Beadle v. Hillsborough County Sheriff’s Dep’t*, 29 F.3d 589, 593 (11th Cir. 1994) (voluntary shift swaps); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1379 (6th Cir. 1994) (partial changes that fail to resolve the conflict are not “reasonable”); *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673, 675–76 (E.D. Ark. 1993) (grooming rule exceptions); *see also* LEX LARSON, EMPLOYMENT DISCRIMINATION § 56.03[2], 56.12 (2d ed. 2003) (discussing “reasonable accommodation,” specifically in connection with collective bargaining agreements, and general constitutional objections to the “reasonable accommodation” clause); Kaminer, *supra* note 19, at 604–10 (examining what it means to resolve the conflict, including what costs the employer may place on an employee requesting accommodation).

inconvenience.<sup>114</sup> In this, "a determination of undue hardship is not so much the result of a balancing of the interests of the employee who seeks accommodation against the employer as it is a finding that accommodation of the employee will impose some nontrivial cost upon the employer or upon other employees."<sup>115</sup> Examples may include efficiency losses, economic costs, health and safety, or breaches to an otherwise valid seniority provision, but would not include employer distaste, coworker grumbling or dissatisfaction alone, or pure speculation on potential liability or market risks.<sup>116</sup> The courts are somewhat split on the issue of coworker complaints, morale, and burdens, although the general consensus seems to be that the resolution of such issues should focus on the objective, rather than subjective, impact on the work lives and job functions of fellow employees.<sup>117</sup>

Political and scholarly reaction to *Hardison* and *Philbrook* in the years following their pronouncements of "de minimis"<sup>118</sup> hardship and employer choice has been mixed as well, although the "nays" have naturally taken prominence in countering the status quo. On the political side, reaction by the EEOC to *Hardison*, although "aggressive"<sup>119</sup> in both tone and in proposing the consideration of "the size and operating cost of the employer"<sup>120</sup> and the "number of individuals"<sup>121</sup> af-

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114 See *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1976) (holding that TWA's payment of premium wages to get a weekend substitute was an undue hardship).

115 Andrew M. Campbell, Annotation, *What Constitutes Employer's Reasonable Accommodation of Employee's Religious Preferences Under Title VII of Civil Rights Act of 1964*, 134 A.L.R. FED. 1, 25 (2003).

116 See *Hardison*, 432 U.S. at 84 (economic costs); *Virts v. Consol. Freightways Corp.*, 285 F.3d 508, 517-18 (6th Cir. 2002) (collectively bargained seniority); *EEOC v. Townley Eng'g and Mfg. Co.*, 859 F.2d 610, 615-16 (9th Cir. 1998) (employer or coworker distastes); *Brown v. Polk County*, 61 F.3d 650, 655 (8th Cir. 1995) (speculative hardships); *Mann v. Frank*, 7 F.3d 1365, 1370 (8th Cir. 1993) (efficiency losses); *Kalsi v. N.Y. City Transit Auth.*, 62 F. Supp. 2d 745, 758 (E.D.N.Y. 1998) (health and safety); see also *Kaminer*, *supra* note 19, at 610-22 (citing cases); *EEOC*, *supra* note 18, at 3 ("Claiming that your coworkers might be 'upset' or 'uncomfortable' when they see your turban is not an undue hardship.").

117 See, e.g., *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001) (requiring coworkers to assume higher workload was an undue burden); *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274-75 (5th Cir. 2000) (holding that a disproportionate workload of coworkers is an undue burden); *Townley Eng'g & Mfg.*, 859 F.2d at 615 (holding that an actual imposition or disruption is required); *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1021 (4th Cir. 1996) (holding that inevitable coworker harassment is an undue burden); see also *Kaminer*, *supra* note 19, at 617-21 (citing cases).

118 *Philbrook*, 479 U.S. at 67 (quoting *Hardison*, 432 U.S. at 84).

119 Gawlik, *supra* note 23, at 254.

120 29 C.F.R. § 1605.2(e)(1) (1998), quoted in *Gawlik*, *supra* note 23, at 254.

fects in calculating “undue hardship”<sup>122</sup> (a notion reflected in WRFA 2003), as well as in requiring the adoption of the “alternative which least disadvantages the individual,”<sup>123</sup> (a concept expressly rejected by *Philbrook*<sup>124</sup>) has generally “held the line,”<sup>125</sup> leaving more aggressive measures to Congress.<sup>126</sup> And, as noted above, members of Congress have been introducing various versions of WRFA 2003 since 1994.<sup>127</sup> Of course, the fact that no such measures have yet passed reflects, at the very least, some congressional support for the Court’s approach. On the academic side, the comments, largely negative, have ranged from assertions that “the Supreme Court has clearly failed to fulfill the intent of Congress”<sup>128</sup> and that it has made Title VII “largely meaningless as a source of protection for the religiously observant employee of the secular employer,”<sup>129</sup> to tepid support, including statements that the *Hardison-Philbrook* duo merely “balance[s] the policies of Title VII and federal labor law”<sup>130</sup> and that, in rejecting impositions of burdens on others, particularly coworkers, *Hardison* recognized that “religious discrimination cuts both ways equally.”<sup>131</sup>

Despite disagreement in Congress, the courts, and the academy over the ultimate question of accommodation and its proper scope, however, the *Hardison* and *Philbrook* interpretative gloss on section 701(j) remains the law of the land. WRFA 2003, of course, would largely change that and, in so doing, would significantly alter both the

121 *Id.*

122 *Id.*

123 *Id.*

124 *See Philbrook*, 479 U.S. at 67–69.

125 Gawlik, *supra* note 23, at 254.

126 *Id.* Interestingly, in a move that could be seen as somewhat of an accommodation counterpoint, the EEOC also adopted in 1993, and shortly thereafter withdrew, administrative guidelines applying Title VII hostile environment standards to religious speech in the workplace. *See Post*, *supra* note 42, at 177.

127 *See* Gawlik, *supra* note 23, at 250 n.5 (citing earlier versions of both House and Senate bills). As Senator Santorum characterized *Hardison* and its progeny, “our Federal courts have essentially read [‘reasonable accommodation’ and ‘undue hardship’] out of the law . . . .” 149 CONG. REC. S5352 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum).

128 Rosenzweig, *supra* note 35, at 2518 n.31 (quoting CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 9.3.3, at 391 (2d ed. 1988)).

129 David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC’s Proposed Guidelines*, 56 MONT. L. REV. 119, 127 (1995).

130 Peter Zablotsky, *After the Fall: The Employer’s Duty to Accommodate Employee Religious Practices Under Title VII After Ansonia Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513, 573 (1989).

131 LARSON, *supra* note 113, §§ 56.03[1], 56.10.



legal and theoretical understandings of religion and its practice in the workplace.

### III. WRFA 2003 AND THE DISABILITY MODEL

By both its preliminary legislative history and by its very text, WRFA 2003 is unmistakably designed to track the accommodation approach of the ADA.<sup>132</sup> With this in mind, let us first turn to the latter statute. The ADA, which was preceded by the Rehabilitation Act of 1973, a disability protection law largely restricted to those receiving federal funds,<sup>133</sup> was enacted in response to what Congress saw as unjust and improper barriers to employment and public services for "disabled" Americans, which it then estimated at forty-three million persons.<sup>134</sup> In its legislative findings at the beginning of the statute, Congress declared, among other things, that:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.<sup>135</sup>

In those same findings, Congress also asserted that "census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."<sup>136</sup> Moreover, Congress found that this "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."<sup>137</sup>

The heart of the ADA's employment provisions bans discrimination by a covered employer "against a qualified individual with a disability because of the disability of such individual."<sup>138</sup> It defines "qualified individual with a disability" as one "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or

132 See 149 CONG. REC. S5353 (daily ed. Apr. 11, 2003) (statement of Sen. Kerry). Compare S. 893, 108th Cong. § 2(a)(4) (2003), with 42 U.S.C. § 12,111(10) (2000) (defining "undue burden" in almost identical terms).

133 See 29 U.S.C. §§ 701-797b (2000).

134 See 42 U.S.C. § 12,101.

135 *Id.* § 12,101(a)(7).

136 *Id.* § 12,101(a)(6).

137 *Id.* § 12,101(a)(9).

138 *Id.* § 12,112(a).

desires,"<sup>139</sup> and includes among its prohibited forms of discrimination the failure to make "reasonable accommodations to the known physical or mental limitations [of a protected individual] . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business . . . ."<sup>140</sup> The statute provides further that "reasonable accommodation" may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters."<sup>141</sup> It defines "undue hardship" generally as "an action requiring significant difficulty or expense"<sup>142</sup> and offers a list of factors to consider in assessing the degree of such hardships, including (1) the "nature and cost of the accommodation";<sup>143</sup> (2) the "overall financial resources"<sup>144</sup> of the business; (3) the "overall size"<sup>145</sup> of the business, including "number, type, and location"<sup>146</sup> of facilities; and finally, (4) the type of operation, including "composition, structure, and functions of [its] workforce."<sup>147</sup> In its enforcement and management of the ADA, the EEOC has also provided substantial guidance for over a decade to covered employers and employees on "reasonable accommodation" and "undue hardship" beyond that which is otherwise provided in the statute.<sup>148</sup>

In elucidating "reasonable accommodation"<sup>149</sup> in the context of job performance under the ADA, the EEOC, citing the 2002 decision by the U.S. Supreme Court in *US Airways, Inc. v. Barnett*,<sup>150</sup> has provided the following summary guidance:

A modification or adjustment is "reasonable" if it "seems reasonable on its face, *i.e.*, ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible." An accom-

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139 *Id.* § 12,111(8).

140 *Id.* § 12,112(b)(5)(A).

141 *Id.* § 12,111(9)(B).

142 *Id.* § 12,111(10)(A).

143 *Id.* § 12,111(10)(B)(i).

144 *Id.* § 12,111(10)(B)(ii).

145 *Id.* § 12,111(10)(B)(iii).

146 *Id.*

147 *Id.* § 12,111(10)(B)(iv).

148 See 2 EEOC Compl. Man. (CCH) § 902, ¶ 6908A, at 5467-6, 5467-28-31 (2003). This guidance supplements the regulations it propounded upon the enactment of the ADA, which are found at 29 C.F.R. § 1630 (2003), with accompanying appendix at 29 C.F.R. § 1630.1 app.

149 42 U.S.C. § 12,111(9).

150 535 U.S. 391 (2002).

modation also must be effective in meeting the needs of the individual. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position.<sup>151</sup>

In *Barnett*, the issue involved changes to a neutral seniority system, which the Court held "would not be reasonable in the run of cases."<sup>152</sup> Though such notions of reasonableness appear to introduce concepts of hardship, the Court expressly rejected this inference by distinguishing "reasonableness" as something that an employee must show according to the "ordinarily or in the run of cases"<sup>153</sup> standard, and "undue hardship" as something that an employer must demonstrate "in the particular circumstances."<sup>154</sup> Moreover, the EEOC does, in fact, give additional guidance on "undue hardship,"<sup>155</sup> thus further clarifying that these are independent, yet intertwined, standards. In so doing, the EEOC states:

"Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship.<sup>156</sup>

Interestingly, the EEOC closes its "undue hardship" summary by stating, as in pertinent regulations, that "[t]he ADA's 'undue hardship' standard is different from that applied by courts under Title VII of the Civil Rights Act of 1964 for religious accommodation."<sup>157</sup>

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151 2 EEOC Compl. Man. (CCH) § 902, ¶ 6908A, at 5467-5 (2003) (citing generally *Barnett*, 535 U.S. at 399-403).

152 *Barnett*, 535 U.S. at 403.

153 *Id.* at 401.

154 *Id.* at 402.

155 *Id.*; see 2 EEOC Compl. Man. (CCH) § 902, ¶ 6908A, at 5467-6 (2003) (providing a comprehensive definition of undue hardship); 2 *id.* § 902, ¶ 6908A, at 5467-28-31 (providing examples and explanations).

156 2 *id.* § 902, ¶ 6908A, at 5467-6 (citations omitted).

157 2 *id.* (citing, inter alia, 29 C.F.R. §§ 1630 app., 1630.15(d) (1997)). Conversely, "[t]he differences between Title VII's religious accommodation clause and the ADA's disability accommodation provision also suggest that Congress did not intend Title VII cases to be persuasive authority in an ADA case." *The Supreme Court, 2001 Term—Leading Cases*, 116 HARV. L. REV. 200, 349 (2002). As the House Report on the ADA provided, "[b]y contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of 'requiring significant difficulty or

WRFA 2003, albeit not as comprehensively, provides accommodation to relevant employees in a manner quite similar to the ADA. First, the Act defines "employee" as an individual "who, with or without reasonable accommodation, is qualified to perform the essential functions of the employment position that such individual holds or desires."<sup>158</sup> Then, as described above, the Act provides that "undue hardship" is "an accommodation requiring significant difficulty or expense,"<sup>159</sup> and notes that, similar to the ADA, such a determination should be made based on such factors as (1) "the identifiable cost of the accommodation, including the costs of loss of productivity and of retraining or hiring employees or transferring employees";<sup>160</sup> (2) "the overall financial resources and size of the employer involved, relative to the number of its employees";<sup>161</sup> and (3) the location and relationship among employer facilities.<sup>162</sup> In a manner seemingly unique to religious discrimination, the Act also proposes that "essential functions" are "the core requirements of an employment position"<sup>163</sup> and not any required restrictions on clothing, time off, or "other practices that may have a temporary or tangential impact" on job performance.<sup>164</sup> Finally, the Act would codify the case holdings described above that accommodations are "reasonable" if they remove "the conflict between employment requirements and the religious observance or practice of the employee"<sup>165</sup> and would expressly forbid the exclusion of religious purposes from general leave policies such as the policy involved in the *Philbrook* case.<sup>166</sup>

Based on the foregoing, the similarities between the approach taken by the ADA and that proposed by WRFA 2003, either by express statutory language or by interpretive regulation, are rather striking. Indeed, the sponsors of the latter piece of legislation have expressly cited the ADA as a model. For example, as Senator Kerry stated in introducing the legislation, WRFA 2003's "common sense definition of undue hardship is used in the Americans with Disabilities Act and

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expense' on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in *Hardison*." *Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1049 n.12 (7th Cir. 1996) (quoting H.R. REP. NO. 101-485(II), at 68 (1990)).

158 S. 893, 108th Cong. § 2(a)(4) (2003).

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.* § 2(b).

has worked well in that context.”<sup>167</sup> Both statutes take a similar approach to those covered by their terms (i.e., definitions of “employee” and “qualified individual”); both define “undue hardship” in like manner, both in its level (“requiring significant difficulty or expense”) and in its factors; and both include conflict resolution as a goal (either in whole or in part) in assessing “reasonableness” (although *Barnett*’s “ordinarily or in the run of cases” assumes a level of objectiveness that may not be readily transferable in the subjective world of “religious practice,” as that term is defined by the courts and the EEOC).

Notwithstanding their shared aspects, the relevant provisions cited above reveal that the statutory (and/or regulatory) language of the ADA and WRFA 2003 also differ in several important ways, some of which, as discussed below, figure quite prominently in assessing the wisdom of the similarities that they do, in fact, maintain. First, WRFA 2003 lacks anything close to the legislative findings of the ADA. In fact, there appear to be no justifications whatsoever built into the text of the Act itself.<sup>168</sup> Second, and along the same lines as the first, the ADA is intended to protect, if necessary, only those with a “disability,” which it defines generally as those with an impairment “that substantially limits one or more of the major life activities,”<sup>169</sup> and which it numbered in 1990 at about forty-three million persons.<sup>170</sup> WRFA 2003 lacks any such definitional limitation on its covered population, other than that implied through the EEOC’s definition of “religion,”<sup>171</sup> and its extent of coverage could conceivably extend to every American working for an employer covered by Title VII.<sup>172</sup> Third, as noted above, resolution of the conflict between an employee’s disability and relevant employer policy (i.e., “effective in meeting the needs of the individual”) is but one factor in the ADA’s determination of reasonableness, whereas it is, in essence, the sole factor under WRFA 2003 (i.e., “the conflict between employment requirements and the religious observance or practice of the employee”), a distinction pointing to the real potential for an even further heightened accommodation duty on the part of the employer under the latter statute.<sup>173</sup>

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167 149 CONG. REC. S5353 (daily ed. Apr. 11, 2003) (statement of Sen. Kerry).

168 Compare 42 U.S.C. § 12,101 (2000), with S. 893 § 2.

169 See 29 C.F.R. § 1630.2(g)(1) (2003).

170 See 42 U.S.C. § 12,101(a)(1).

171 See 29 C.F.R. § 1605.1.

172 See Clegg, *supra* note 23, at 58 (explaining that, unlike the ADA, WRFA 2003 “includes potentially everyone”).

173 See 2 EEOC Compl. Man. (CCH) § 902, ¶ 6908A, at 5467-5 (2003); S. 893 § 2(b).

Finally, and perhaps most pertinently to the present discussion, the ADA expressly provides that its theory of discrimination protection is "based on characteristics that are beyond the control of such individuals."<sup>174</sup> Although WRFA 2003 may imply such a theory, it is left unsaid in the statutory text, and, in any event, is cause for concern, as this Article aims to establish.

In both similarity and difference, a comparison of the ADA and WRFA 2003, at least in their statutory language and/or accompanying regulation(s) (if not application) provides quite fertile ground for assessing the implications of using the "disability model" in the religious accommodation analysis. To paraphrase Senator Kerry, although the provisions of the ADA (accompanied by relevant regulations) may have arguably "worked well in [the disability] context,"<sup>175</sup> it is far from clear that they would prove as successful in the religious practice context.

#### IV. PRACTICAL IMPLICATIONS OF THE DISABILITY MODEL

Once again, in adopting the ADA's "significant difficulty or expense" standard as its "undue hardship" ceiling, WRFA 2003 proposes a much higher obligation on covered employers than that espoused by the Supreme Court in *Hardison*. Moreover, in requiring such duties in the realm of individual religious practice, this obligation is heightened even further. In borrowing the statutory approach of the ADA, the Act may be intended to incorporate a theory of accommodation that "strikes an appropriate balance between religious accommodation, while ensuring that an undue burden is not forced upon American employers."<sup>176</sup> Yet, as laudable as this goal may be, the practical results of this effort at a supposed "balance" might prove otherwise.

In reviewing Title VII as it would be amended by the Act, its relevant protection extends to individuals "who, with or without reasonable accommodation" are "qualified to perform the essential functions"<sup>177</sup> of the job at issue, but are denied accommodation "because of" their "religion."<sup>178</sup> Under the ADA, the "essential functions" qualifier is designed "simply to show that disabled persons have the same opportunities available to them as are available to non-disabled persons," enhanced, if at all, only by a "reasonable accommoda-

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174 42 U.S.C. § 12,101(a)(7).

175 149 CONG. REC. S5353 (daily ed. Apr. 11, 2003) (statement of Sen. Kerry).

176 *Id.* at S5352 (statement of Sen. Santorum).

177 S. 893 § 2(a)(4).

178 42 U.S.C. § 2000e-2(a).

tion.”<sup>179</sup> Although this principle in the religious context might appear sound at first blush, both what it includes and what it does not include under WRFA 2003 show it to be rather meaningless.

In its inclusive use as a *prima facie* threshold for a plaintiff,<sup>180</sup> any showing of the “essential functions” requirement is almost entirely within the power of the plaintiff. As under the ADA, such determinations would most likely be made on a case-by-case basis with primary consideration to employer preferences in establishing the existence and extent of such functions,<sup>181</sup> but given the individual and subjective nature of religion and its attendant practice(s), at least as interpreted by the EEOC,<sup>182</sup> the question of performing such functions is taken out of employers’ hands, absent a challenge to the sincerity of the religious practice leading to the alleged conflict (or, as is more likely in this *prima facie* context, the lack of such conflict).<sup>183</sup> More importantly, however, by excluding, as it does categorically, functions such as required clothing and adherence to attendance rules from its statutory definition of “essential functions,”<sup>184</sup> the Act deprives employers from relying on what, at least in some cases, they might deem to be quite “essential” job tasks.<sup>185</sup> The case-by-case analysis would presumably remain, but the Act’s express exclusion of leave and clothing does create significant definitional difficulties not otherwise shared by the ADA.<sup>186</sup>

The practical implications of the Act’s “reasonableness” definition are even more striking. As noted above, the ADA, as applied and interpreted, presents a multi-factored approach to its “reasonableness” determination that incorporates an objective standard (i.e., “or-

179 *Jenkins v. Northwood Rehab. & Extended Care Facility*, 267 F. Supp. 2d 282, 286 (N.D.N.Y. 2003).

180 *See Moritz v. Frontier Airlines*, 147 F.3d 784, 786–87 (8th Cir. 1998) (finding that passenger assistance was an essential function of a ticket taker’s position).

181 *See* 29 C.F.R. § 1630.2(n) (2003).

182 *See id.* § 1605.1.

183 *See EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarilados*, 279 F.3d 49, 56 (1st Cir. 2002) (asserting that “[t]he element of sincerity is fundamental, since ‘if the religious beliefs that apparently prompted a request are not sincerely held, there has been no showing of a religious observance or practice that conflicts with an employment requirement’”) (quoting *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997)).

184 *See* S. 893, 108th Cong. § 2(a)(4) (2003).

185 *See, e.g., Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir. 1998) (asserting that, in an ADA case, “attendance at work is a necessary job function”).

186 Strictly interpreted, there is no “exception to the exception,” even based on safety or other concerns. *See* S. 893 § 2(b). Indeed, under the proposed statutory language, “temporary or tangential impact” does not refer to clothing or leave policies. *See id.*

dinarily or in the run of cases").<sup>187</sup> On the other hand, WRFA 2003 provides that the sole factor for its "reasonableness" determination is that "the accommodation shall remove the conflict between employment requirements and the religious observance or practice of the employee."<sup>188</sup> The imposition of this standard necessarily demands a black-and-white approach to accommodation that, as in the "essential function" analysis, is subject to whatever religious practice, whether objective or subjective, is chosen by the relevant employee.<sup>189</sup> In this way, it can be argued that "WRFA constructively pushes 'reasonable' into the realm of 'absolute' by stripping the employer of discretion in business decision making."<sup>190</sup> Indeed, as Senator Santorum concedes, employers in this area are dealing with "personal religious standards which govern personal activity."<sup>191</sup> Consequently, "undue burden" would, in effect, become the ultimate determinant (or "exception")<sup>192</sup> in assessing whether or not a violation of Title VII, as amended by WRFA 2003, has been committed by an employer otherwise covered by its terms.

Based on the foregoing and the statutory text, the cause for the greatest concern, at least from a practical perspective, is the implications from the "significant difficulty or expense" level of "undue hardship"<sup>193</sup> proposed by WRFA 2003, which would overrule the "de minimis" standard stated by *Hardison* to have been the will of Congress in its amendment of section 701(j).<sup>194</sup> In this, comparisons of cases under the ADA's "significant difficulty or expense" test, together with pertinent EEOC guidance, and those under the current 701(j)/*Hardison* "de minimis" standard offer predictive insight. Indeed, as the House Report on the ADA provided, the ADA mandates "a significantly higher standard" of "undue hardship" than that now required

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187 See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 399–403 (2002) (applying the EEOC guidelines); 2 EEOC Compl. Man. (CCH) § 902, ¶ 6908A, at 5467-5 (2003).

188 S. 893 § 2(b).

189 As Professor Kaminer points out, some courts have indicated that the "flexible" accommodation process between employers and employees should include a willingness on the part of employees to "compromise" their beliefs. See Kaminer, *supra* note 19, at 599. However, as she points out, this position has been largely rejected by "most courts examining the issue." *Id.* at 600 (citing *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141 (5th Cir. 1982); *Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir. 1978); *EEOC v. IBP, Inc.*, 824 F. Supp. 147 (C.D. Ill. 1993)).

190 Gawlik, *supra* note 23, at 263 (discussing earlier, yet similarly worded, versions of WRFA 2003).

191 149 CONG. REC. S5352 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum).

192 See Gawlik, *supra* note 23, at 266–68.

193 S. 893 § 2(a)(4).

194 *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84–85 (1977).



by Title VII for accommodation of religious practices.<sup>195</sup> Thus, considerations of financial costs, administrative burdens, administrative complexity, and any other negative impacts on business, all of which would factor into the Act's standard by virtue of their role in the ADA's "undue hardship" analysis,<sup>196</sup> would naturally lead to an accommodation significantly higher than "de minimis."

For example, under the ADA, the hiring of a "reader" to assist an employee with a vision disability may be a "reasonable accommodation" without "undue hardship" for a larger employer, even though this could cost thousands of dollars (i.e., something which would certainly be higher than "de minimis").<sup>197</sup> Similarly, private parking for a walking impaired employee at a cost of about \$400 per month, and a text telephone for a hearing impaired employee at a cost of several hundred dollars (both of which are more than "de minimis" amounts), have been posited as "reasonable accommodations" for relevant nonprofit employers.<sup>198</sup> Even *Hardison* would almost certainly come out differently under the Act's standard. As Justice Marshall noted in dissent, the accommodation sought there involved, at most, additional overtime for another at "\$150 for three months, at which time [Hardison] would have been eligible to transfer back" to a non-conflicting shift.<sup>199</sup> Given that various members of the Court disagreed on whether this cost would even be "de minimis," one can deduce that a majority would most likely consider it less than "significant."<sup>200</sup> As the Ninth Circuit has pointed out, and contrary to the

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195 H.R. REP. NO. 101-485(II), at 68 (1990).

196 See *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 737 (D. Md. 1996) (placing initial burden of proof on plaintiff); see also 42 U.S.C. § 12,111(10)(B) (2000) (describing a qualified employee as one who can perform the essential functions of the position); S. 893 § 2(a)(4) (same).

197 See 2 EEOC Compl. Man. (CCH) § 902, ¶ 6908A, at 5467-11 (2003); see also *Nelson v. Thornburgh*, 567 F. Supp. 369, 380 (E.D. Pa. 1983) (finding that the Rehabilitation Act requires "part-time" readers for blind typists at a state Department of Public Welfare at a cost of \$6638 per year, per typist). In reviewing *Nelson*, note that "the substantive standards for determining liability under [the ADA and the Rehabilitation Act] are the same." *Myers v. Hose*, 50 F.3d 278, 281 (4th Cir. 1995) (citations omitted). As Alan Schuchman points out, both the *Hardison* and *Nelson* decisions "vividly demonstrate the differing results of 'reasonable accommodation' under the two acts." Schuchman, *supra* note 23, at 746.

198 See *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1514, 1516-17 (2d Cir. 1995) (holding that a parking space in New York City at a cost of \$300-\$520 per month for a staff attorney survives a motion to dismiss); *Bryant*, 923 F. Supp. at 730 (procuring a text telephone, or TTY, device at a cost of \$279 is reasonable for a local nonprofit consumer information agency).

199 *Hardison*, 432 U.S. at 92 n.6 (Marshall, J., dissenting).

200 See *id.* at 84; see also *id.* at 92 (Marshall, J., dissenting).

approach taken by the Court in *Hardison*, accommodation under the ADA necessarily contemplates an “extra cost” for disabled employees.<sup>201</sup>

With regard to shift policies, work breaks, transfer of functions, safety issues, and other accommodations that do not, at least directly, involve *financial* costs, the Act’s “significant difficulty or expense” standard would also increase burdens on employers in the religious accommodation context beyond those presently required (e.g., voluntary shift swaps, unpaid leave).<sup>202</sup> Under the “de minimis” standard of *Hardison*, and as noted in the opening paragraph of this Article, employers are generally not required to impose “shift and job preferences” on other employees,<sup>203</sup> need not absorb efficiency losses from regular breaks or leave,<sup>204</sup> and need not take any action that “would impair safety at the workplace.”<sup>205</sup> Under the ADA approach, and therefore that of WRFA 2003, however, involuntary shift and job modifications may very well be mandated<sup>206</sup> (at least absent a collectively bargained agreement or firmly established seniority system, as in *Barnett*).<sup>207</sup> Moreover, modifications for breaks or leave, and a trans-

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201 *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1070 (9th Cir. 2000). In fact, as one federal district court has opined, “the only categorical limit on the obligation to accommodate [under the ADA standard] appears to be cases of extraordinary cost.” *Kilcullen v. N.Y. State Dep’t of Transp.*, 33 F. Supp. 2d 133, 149 (N.D.N.Y. 1999); *see, e.g., Balls v. AT&T Corp.*, 28 F. Supp. 2d 970, 974 (E.D. Pa. 1998) (finding a \$12 million voice-activated system for carpal tunnel syndrome an undue hardship).

202 *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986) (finding that employers are required under Title VII to provide leave for religious observance); *Beadle v. Hillsborough County Sheriff’s Dep’t*, 29 F.3d 589, 593 (11th Cir. 1994) (upholding voluntary shift swaps as “reasonable” accommodations under Title VII).

203 *Hardison*, 432 U.S. at 81.

204 *See WOLF ET AL., supra* note 8, at 121–24 (discussing *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997); *see also Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994); *EEOC v. Caribe Hilton Int’l*, 597 F. Supp. 1007 (D.P.R. 1984), *aff’d*, 821 F.2d 74 (1st Cir. 1987)).

205 *See id.* at 115; *see also Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382, 1383–84 (9th Cir. 1984) (approving of grooming standards under a “de minimis” safety rationale).

206 *See* 42 U.S.C. § 12,111(9)(b) (2000) (listing “job restructuring” as a “reasonable accommodation” under the ADA).

207 *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 403 (2002) (holding that modifications to established seniority rules are not required in “the run of cases”); *see also Eckles v. Consol. Rail Corp.*, 94 F.3d 1041, 1048 (7th Cir. 1996) (finding that collectively bargained seniority rights need not be adjusted as an accommodation). However, even if a collective bargaining agreement would be violated, the EEOC cites *Barnett* for the proposition that there may be “special circumstances” under which reassignment might be reasonable “despite the existence of a seniority system.” 2 EEOC Compl. Man. (CCH) § 902, ¶ 6908A, at 5467-23 (2003) (citing *Barnett*, 535

fer of functions (though not “essential” ones) are contemplated under the accommodation standard of “significant difficulty or expense.”<sup>208</sup> Furthermore, efficiency gaps are necessarily considered, at least to an extent greater than “de minimis,” as part of the employer’s accommodation duty.<sup>209</sup> Finally, as far as safety is concerned, under the ADA, danger to one’s self does not, in itself, constitute an “undue hardship,”<sup>210</sup> and given that, unlike the ADA, WRFA 2003 does not offer a “direct threat to others” exception to accommodation duties, safety—either for one’s self or for others (typically, coworkers or customers)—may similarly not alleviate an employer from an accommodation duty.<sup>211</sup> This omission might prove interesting in the “snake handling” hypothetical offered in the opening paragraph above.

In discussing accommodation duties under WRFA 2003, one should also note the particular problem that may arise in adherence

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U.S. at 405–06). At a minimum, it should be noted that WRFA 2003 did remove a particularly objectionable seniority based provision in earlier versions of the legislation, namely express language providing that “[i]t shall *not* be a defense to a claim of unlawful employment practice . . . that such accommodation would be in violation of a bona fide seniority system.” Baxter, *supra* note 79, at 6 (quoting H.R. 4237, 106th Cong. § 2(b)(4)(A) (2000)) (emphasis added); *cf.* S. 893, 108th Cong. (2003) (retaining the seniority based provision).

208 See *Barnett*, 535 U.S. at 397–98 (discussing modifications to neutral break or leave rules and citing, *inter alia*, *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 (1st Cir. 2000), on the latter); see also 29 C.F.R. § 1630.2(o)(2)(ii) (2003) (stating that “job restructuring” may be a “reasonable accommodation”); 2 EEOC Compl. Man. (CCH) § 902, ¶ 6908A, at 5467-28 to 5467-29 (2003) (noting that an employer is to transfer “marginal” functions to coworkers if there is no “significant disruption to its operation”).

209 Indeed, “Congress rejected efficiency as the guiding principle for the ADA and . . . the Act sometimes requires inefficient actions.” Schwab & Willborn, *supra* note 28, at 1202–03 (citing 42 U.S.C. §§ 12,111(10), 12,112(b)(5)(A); Gregory S. Crespi, *Efficiency Rejected: Evaluating “Undue Hardship” Claims Under the Americans with Disabilities Act*, 26 TULSA L.J. 1 (1990)).

210 See *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1070 (9th Cir. 2000) (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 209–10 (1991)).

211 Compare 42 U.S.C. § 12,113 (discussing that, under the ADA, employers may require “that an individual not pose a direct threat to the health or safety of other individuals in the workplace”), with S. 893, 108th Cong. (2003) (containing no such mention of health or safety exceptions, for the employee or anyone else, under WRFA 2003). Possible protection may reside in a dangerous plaintiff not otherwise being “qualified” to perform the “essential functions,” see *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997) (applying this analysis in the ADA context), but it would seem difficult to apply this notion to willful religious conduct that would likely be more ancillary to actual job performance than danger from a physical or mental disability.

to other legal responsibilities.<sup>212</sup> In this, perhaps the most prominent of responsibilities, at least according to the scholarly literature, is an employer's countervailing obligation under Title VII to maintain a work environment free from hostility, including that of a religious nature. At present, courts have not interpreted the "de minimis" standard to require an employer to accommodate religious conduct that might otherwise violate Title VII hostile work environment rules of conduct.<sup>213</sup> As the Eighth Circuit has posited, "Title VII does not require an employer to allow an employee to impose his religious views on others."<sup>214</sup> However, under the ADA accommodation standard proposed by WRFA 2003, and in light of the failure of the 1993 EEOC guidelines to apply hostile environment theory to religious activity in a more systematic way,<sup>215</sup> avoidance of harassment may not serve as much of a defense to accommodation.<sup>216</sup> Thus, the current balance would most likely be upset, and, as a result, employers would be placed more firmly than ever "between a rock and a hard place"<sup>217</sup> in meeting their respective Title VII obligations.

In assessing the foregoing increases in accommodation obligations that might be imposed on employers under the Act, it is important to remember that the determination of "undue hardship" would be made on a "case-by-case" basis.<sup>218</sup> As under the ADA, it would constitute a "multi-faceted, fact-intensive [inquiry], requiring consideration of: (1) financial cost, (2) additional administrative burden, (3) complexity of implementation, and (4) any negative impact . . . on the

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212 See WOLF ET AL., *supra* note 8, at 118–19 (discussing *United States v. Bd. of Educ.*, 911 F.2d 882 (3d Cir. 1990), and citing, *inter alia*, *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984)).

213 See *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1021 (4th Cir. 1996) (holding that accommodation of certain hostile letters to coworkers would not be required).

214 *Wilson v. US West Communications*, 58 F.3d 1337, 1342 (8th Cir. 1995) (holding that accommodation of the wearing of a religious button would not be required if it would unduly offend coworkers).

215 See Betty L. Dunkum, *Where to Draw the Line: Handling Religious Harassment Issues in the Wake of the Failed EEOC Guidelines*, 71 NOTRE DAME L. REV. 953, 985 (1996) (discussing the inherent conflict of the failed guidelines with the present accommodation requirements of Title VII).

216 See DelPo, *supra* note 45, at 349 (discussing potential for increased "hostile environment" conflict with WRFA standards); *cf.* *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1070 (9th Cir. 2000) (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 209–10 (1991), in its discussion of preemption of, at least, state tort law in meeting accommodation obligations under the ADA).

217 *Chalmers*, 101 F.3d at 1021.

218 See 29 C.F.R. § 1630.2(p) (2003) (listing the pertinent ADA regulations).

operation of the employer's business."<sup>219</sup> As Senator Santorum has noted, "[t]hus, a smaller business with less resources and personnel would not be asked to accommodate religious employees in exactly the same fashion as would a large manufacturing concern."<sup>220</sup> Although these considerations are offered in an effort to balance religious and business interests, it is somewhat odd that one's "first freedom," as the Senator refers to religious accommodation in this context,<sup>221</sup> should not be subject to any compromises save those involving the size and/or resources of one's employer.<sup>222</sup> Of course, as discussed in greater detail below, this is perhaps the central theoretical problem facing the religious accommodation in employment dilemma, a dilemma typified by Title VII's very definition of "religion" itself as something with both reasonable and hardship boundaries.<sup>223</sup>

In sum, the practical consequences of the enactment of WRFA 2003 would be significant. In replacing *Hardison's* "de minimis" standard of accommodation, and, thus, section 701(j), with the ADA's "significant difficulty or expense" test, the Act would require covered employers to bear greater financial costs and would impose upon them a heightened duty to alter their leave, break, shift, job structure, or even safety policies when necessary to accommodate the religious practices of its employees. These practical, or "business," consequences have generally formed the bulk of the grounds for opposition to the Act in its manifestations in earlier Congressional legislation.<sup>224</sup> Even granting these practical results, however, perhaps the greatest impact of the Act may lie in its theoretical understanding of religion, an understanding that cuts to the heart of a debate over not only the

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219 *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 737 (D. Md. 1996) (citation's omitted); *see also* 42 U.S.C. § 12,111(10)(B) (2000) (describing the four factors to consider in determining whether there is an undue burden under the ADA); S. 893, 108th Cong. § 2(a)(4) (2003) (describing the three factors to consider in determining if undue hardship exists).

220 149 CONG. REC. S5352 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum). Notably, Senator Santorum's remarks on the relative impact of "undue burden" reflect the perspective articulated by Justice Marshall in his dissent in *Trans World Airlines, Inc. v. Hardison*, where he argued that "to conclude that TWA, one of the largest air carriers in the Nation, would have suffered undue hardship had it done anything more defies both reason and common sense." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 91 (1977) (Marshall, J., dissenting).

221 149 CONG. REC. S5353 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum).

222 Compare S. 893 § 2(b) (mandating resolution of the "conflict" between employer policy and employee religious practice), with 29 C.F.R. § 1630.2(p) (discussing ADA regulations, analogous to those that would likely be promulgated under WRFA 2003, that indicate a flexible, case-by-case approach to "undue hardship").

223 See 42 U.S.C. § 2000e(j) (defining "religion" under Title VII).

224 See Eckstrom, *supra* note 21.

role of religion in the workplace, but also over the very nature of religion in society as a whole.

## V. THEORETICAL IMPLICATIONS AND THE IMMUTABLE PROBLEM

As described above, "Title VII, as originally passed, treated religion the same as race, color, sex, or national origin."<sup>225</sup> In so doing, the original statute "prohibited discrimination, but contained no language specifically requiring accommodation of religious employees," or of any other class of employees for that matter.<sup>226</sup> With the amendment of section 701(j), of course, the accommodation principle was added for "religion." Thus, not only does Title VII consider religion comparable to qualities such as race, color, sex, or national origin for purposes of protection from prejudicial discrimination, it affords religion even more protection by accommodation. In this manner, "the final effect of an accommodation to an employee's religious beliefs is to give that employee some benefits or preferential treatment to which he would not otherwise be entitled."<sup>227</sup>

### A. The "Belief" Boundary

The wisdom of treating religious belief (or status) itself as something worthy of the protection afforded such "suspect classes" as race and national origin<sup>228</sup> in the workplace appears to be rather sound, or at least not subject to much debate. Whether volitional or not, religious belief (or status), or the lack thereof, may be considered as fundamental to the "basic autonomy of identity and self-creation" of a person, as either a citizen or an employee.<sup>229</sup> For this reason (and perhaps others more utilitarian, such as a check on government, a source of charity, or for support of public order), religious beliefs have been singled out for protection in relationship with the state from the beginning of the Republic.<sup>230</sup> As one scholar has noted, "for

<sup>225</sup> Kaminer, *supra* note 19, at 580 (citations omitted); *see also* Moberly, *supra* note 32, at 3 (noting that "race and religion are generally treated similarly for Title VII purposes").

<sup>226</sup> Kaminer, *supra* note 19, at 580.

<sup>227</sup> Kenneth G. Frantz, *Religious Discrimination in Employment: An Examination of the Employer's Duty to Accommodate*, 1979 DETROIT C.L. REV. 205, 209.

<sup>228</sup> *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (noting "suspect classifications" of race, religion, and national origin in the constitutional context).

<sup>229</sup> Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 95 (1990).

<sup>230</sup> *See* Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 332-45 (2001) (offering a structural approach to religious liberty);

constitutional purposes, religious affiliation is an immutable characteristic vis-à-vis state action, at least to the extent that the free exercise clause condemns as invidious the penalizing of religious beliefs."<sup>231</sup> In this, as James Madison once argued, "the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men."<sup>232</sup> Although the history is limited,<sup>233</sup> this idea of "religious freedom," both in its individual autonomy and state noninterference dimensions, is reflected in Title VII's original protections, both in its inclusion of religious belief and in its exclusion of affirmative accommodation.<sup>234</sup>

In the employment context, protection of belief (or status) alone not only reflects notions of "religious freedom" from constitutional law, it also conforms with the theory of "equal treatment" that otherwise frames the Civil Rights Act of 1964.<sup>235</sup> Protection of belief, as in the case of race or gender, is grounded in a policy of rooting out particular forms of "prejudice" (commonly defined as an "opinion formed . . . without knowledge or examination of the facts"<sup>236</sup>) that are not only deemed odious to society in general but which have no corresponding, or at least no rational, public or market benefits.<sup>237</sup> In extending this model to religious belief (as in 1964), there are no objective costs placed on the employer, or anyone else for that matter, other than a duty to refrain from the use of certain criteria in making

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see also JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 44-45 (2000) (describing the benefits of religious freedom at the nation's Founding).

231 Brownstein, *supra* note 229, at 110 (citation and emphasis omitted).

232 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in BASIC DOCUMENTS RELATING TO THE RELIGION CLAUSES OF THE FIRST AMENDMENT 7 (Am. United for Separation of Church & State ed., 1965).

233 See Edwards & Kaplan, *supra* note 43, at 600 (noting that race discrimination was the primary issue focused on in the hearings, and because of this the problems of including religious discrimination were not looked at as carefully as they perhaps should have been).

234 See *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 334-36 (1970) (noting belief coverage and no accommodation by both original Title VII and First Amendment); Edwards & Kaplan, *supra* note 43, at 602-04 (tracing the constitutional origins of Title VII).

235 See Jolls, *supra* note 31, at 643 (citing Post, *supra* note 31, at 9-12).

236 THE AMERICAN HERITAGE DICTIONARY 1384 (4th ed. 2000).

237 See Post, *supra* note 31, at 8 ("Antidiscrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities."). Indeed, as the Court posited in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), Congress required under Title VII "the removal of artificial, arbitrary, and unnecessary barriers to employment . . ." *Id.* at 431.

employment decisions that, at least in theory<sup>238</sup> and/or in the long run,<sup>239</sup> should have no effect on performance of the job at issue.<sup>240</sup> In this sense, the message is that prejudice does not pay, either in the market or in the law.

In addition to the "equal treatment" of religious belief, the issue of mutability or volition, or the lack thereof, also justifies protection in the workplace. In this sense, and notwithstanding the constitutional theories described above, protection of religious belief does not demand any particular resolution of the mutability question, or, for that matter, depend as heavily upon whether something should be characterized by the EEOC or a court as a "religious" practice. As one scholar has noted, "[i]t can be argued that religion is the only basis of discrimination included in Title VII that is alterable . . . [o]n the other hand, it can be argued that its inclusion in that group of bases [e.g., sex, race] indicates a congressional belief that it is not alterable or

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238 As mentioned above, see *supra* note 72, Professor Jolls and others have challenged the "no cost" theory of nondiscrimination law (even absent affirmative accommodation requirements) in that there are situations where the theory requires "employers to incur undeniable financial costs associated with employing the disfavored group of employees." Jolls, *supra* note 31, at 645; see also Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates—Aren't They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111, 125 (2003) (noting the "profitability" of intentional discrimination in light of prejudice of customers or coworkers). In practice, this might very well be the case, but in developing a consistent and long-range theory (and policy) of legal treatment, particularly regarding the imposition of affirmative employer duties, the differences between action (i.e., accommodation) and omission (i.e., nondiscrimination) are not only insightful in what they express about the role of law in the employment arena, but also reflect the treatment of such matters by the pre-section 701(j) courts in cases like *Dewey*, in the actions taken by Congress in amending section 701(j) ("[T]he 701(j) requirement of religious accommodation is based on a separate and distinct theory of discrimination." 2 EEOC Compl. Man. (CCH) § 628.4, ¶ 5004, at 4183 (1998)), and the current efforts of WRFA 2003 itself. Indeed, it cannot be said that the obligations imposed by WRFA 2003 are implicit in Title VII, as originally enacted in 1964.

239 As Professors Schwab and Willborn have commented, "[t]he ability of law to function as a preference-shaping mechanism, rather than simply a preference-accumulation mechanism, is becoming increasingly well recognized. There is considerable evidence that Title VII has changed existing preferences about the proper role of women and African Americans in the workplace." Schwab & Willborn, *supra* note 28, at 1217–18 (footnote omitted). Regarding "myths" of productivity differences in the discrimination context, they continue, "[e]rroneous myths of this type, however, can last only if a market failure causes employers to systematically ignore profitable opportunities to hire undervalued workers." *Id.* at 1220.

240 See *id.* at 1200 ("The central thrust of Title VII employs a 'sameness' model of discrimination, requiring employers to treat African Americans and women exactly the same as others; their race and sex must be ignored and employers must focus instead on factors related to productivity.") (citations omitted).



that people either are or are not religious.”<sup>241</sup> The issue, of course, is debatable.

Some might argue that “religious convictions frequently appear to their possessors as immutable; something they did not choose, but which chose them,”<sup>242</sup> whereas others may argue that religion is “chosen”<sup>243</sup> and is “within the control of a person.”<sup>244</sup> In all of this, undeniable “skepticism” by courts in assessing the validity of a religious claim may stem “in part, from the fact that religion is a belief system that cannot be logically or rationally proven, a fact that troubles some courts in our modern rationalist society.”<sup>245</sup> In any event, however one resolves the matter, protection of belief offers a reasonable middle ground. Again, this protection seeks nothing other than exclusion of a particular “prejudice.” It also conveniently collapses potential areas of subjective overlap with race, gender, or national origin, in that whether or not an employer or employee perceives a belief or characteristic as arising under one *or more* of these “classes,” it is protected.<sup>246</sup> As a result, even if one can prove that religious belief comes from nature, nurture, or a combination of the two, the issue is largely irrelevant, not only in terms of an ultimate understanding in the law, but also in terms of the cost to be borne by employers, employees, and society generally in offering Title VII protection.

Although religious belief or status alone provides perhaps the brightest coverage boundary, the “de minimis” accommodation standard also provides a range of protection that fulfills the “equal treatment” antiprejudice goal without imposing inordinate costs on the relevant parties. As the Court noted in applying this standard for section 701(j) in *Hardison*, “the paramount concern of Congress in en-

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241 Schuchman, *supra* note 23, at 757.

242 Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 62 (1992).

243 Theresa M. Beiner & John M.A. DiPippa, *Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L. REV. 577, 590 (1997) (citing Jamar, *supra* note 33, at 727).

244 Post, *supra* note 31, at 8.

245 Kaminer, *supra* note 19, at 577–78. The Court noted in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988), that it “cannot determine the truth of the underlying beliefs that led to the religious objections here.” *Id.* at 449. In so doing (or not doing), the courts generally examine only the sincerity of belief, rather than the substance thereof. See Beiner & DiPippa, *supra* note 243, at 599 (citing cases).

246 See Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1098 n.128 (1996) (citing Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 833 (1994), for the proposition that “religion” is a factor in ethnicity and “national origin” assessments).

acting Title VII was the elimination of discrimination in employment.”<sup>247</sup> Certainly in “requiring, at least in certain instances, that employees who claim the need for religious accommodation be treated differently from other employees, Title VII’s religious accommodation provision poses a challenge to the liberal, or neutral, ideology embedded in the interpretation of the remainder of the statute.”<sup>248</sup> Yet, a “de minimis” standard does not impose as inordinate a “challenge” as, say, “significant difficulty or expense,” nor does it deviate significantly from the goal of “equal treatment” in targeting intentional discrimination that might otherwise lie hidden behind a neutral workplace rule—in a manner similar to the “disparate impact” theory of discrimination under Title VII generally,<sup>249</sup> albeit resulting in individual exceptions rather than a class based remedy.<sup>250</sup> In this sense, the “de minimis” standard is more faithful (no pun intended) to the “neutral ideology” of Title VII than one might initially think.

*B. The “Postjudice” of “Significant Difficulty of Expense”*

Unlike belief or status alone, or even a “de minimis” test of accommodation, the “significant difficulty or expense” standard of WRFA 2003 does not properly address the values of “equal treatment” and restraint in resolving theological disputes over the nature of religion. First, in imposing “significant difficulty or expense,” the Act concretely and unambiguously affords preferential treatment for religious practices and does so at an affirmative cost to employers and their business. Second, in adopting the ADA’s theory of accommodation, the Act effectively demands certain conclusions about the nature of religion, either as an immutable notion or as something that is so important that its attendant activities should be subsidized by other citizens, either of which unduly enmesh the Congress (and, thereby, the

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247 *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 85 (1977).

248 Engle, *supra* note 32, at 320.

249 The similarity between “de minimis” accommodation and “disparate impact” theory can also be seen in their defenses in that both relieve an employer of liability if relevant changes would impose “real economic costs on the employer.” See Schwab & Willborn, *supra* note 28, at 1199, 1241 (describing disparate impact cost/productivity theory).

250 See Rabin-Margalioth, *supra* note 238, at 124 (describing disparate impact law examples of accommodation under Title VII); see also 42 U.S.C. § 2000e-2(k) (2000) (outlining Title VII’s relevant treatment of “disparate impact” theory via the Civil Rights Act of 1991); *Griggs v. Duke Power Co.*, 401 U.S. 424, 435–36 (1971) (adopting of the theory by Supreme Court). As noted, a finding of illegal “disparate impact” discrimination typically demands a complete elimination of the policy or rule at issue, rather than individual exceptions to the rule, as in the accommodation model. See 42 U.S.C. § 2000e-2(k).

courts) into matters beyond its expertise, or perhaps even beyond its power. Finally, in its proposal of a "significant difficulty or expense" accommodation test for employers, the Act finds itself in conflict with the analogous constitutional standard otherwise required of the state in matters of religion, namely that of neutrality and nonentanglement.

As discussed above, the "normal duty under Title VII is not to treat employees differently in an adverse manner based on the listed characteristics," whereas in the case of religious accommodation, particularly as enunciated by WRFA 2003, "an employer has a duty to discriminate in favor of certain employees by granting an employee special treatment."<sup>251</sup> Some, including Professor Christine Jolls, might dispute the difference in cost between current accommodation and nondiscrimination levels where the latter would regulate decisions that might otherwise, at least now, be economically rational.<sup>252</sup> Nevertheless, by adopting the ADA's high standard and applying it to an even wider range of employees by factors that are often unrelated to job performance or discrimination history, WRFA 2003 would place an unprecedented and inordinate burden on employers (and, potentially, coworkers as well) that inures solely to the benefit of religious concerns.<sup>253</sup> Of course, the "affected class" includes potentially any employee of a covered employer who engages in, or is otherwise affected by,<sup>254</sup> religious activity, unlike the forty-three million persons

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251 Jamar, *supra* note 33, at 742.

252 See Jolls, *supra* note 31, at 645; see also Rabin-Margalioth, *supra* note 238, at 123–27 (discussing the overlaps in employer cost between accommodation and non-discrimination standards as they presently operate in certain areas of modern discrimination law).

253 See Schwab & Willborn, *supra* note 28, at 1200 (describing the "sameness" model of Title VII and the "difference" model of ADA). Compare *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (stating that ADA "accommodation" necessarily "requires the employer to treat an employee with a disability differently, *i.e.*, preferentially"), with *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (finding that section 701(j) of Title VII does not "involve unequal treatment of employees on the basis of their religion").

254 It should be noted that discrimination "because of" religion can also protect the nonreligious employee, whether from coworker harassment or from the imposition of religious requirements or special treatment of religion by employers. See, *e.g.*, *Venters v. City of Delphi*, 123 F.3d 956, 971–74 (7th Cir. 1997) (discussing "religious" harassment); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 143–45 (5th Cir. 1975) (stating that atheist objections to mandatory religious meetings are actionable); *Turic v. Holland Hospitality, Inc.*, 849 F. Supp. 544, 551 (W.D. Mich. 1994) (exploring harassment in a "Christian workplace").

estimated by Congress to benefit from ADA protection.<sup>255</sup> Yet, the “religion” trigger for protection still results in an inevitable discrimination among the various requests and/or needs facing a covered employer.<sup>256</sup> As under the ADA, the Act’s “clear purpose [is] to require employers to treat individuals [seeking accommodation] more favorably than they had been treated prior to the Act.”<sup>257</sup>

Turning from the profane to the sacred, the “significant difficulty or expense” test<sup>258</sup> can be seen as inevitably leading to one (or both) of the following two conclusions about the nature of religious activity: (1) it is immutable and, therefore, must be accommodated to eliminate prejudice and ensure equal opportunity; or (2) regardless of mutability, it is of such a high value that it should be protected anyway. Either one of these conclusions is suspect, at least as support for the “significant” accommodation standard imposed by the Act. The former is neither supported by relevant notions of mutability in other contexts, including the antiprejudice model of Title VII, nor does it have sufficient policy roots to mandate the imposition of resulting costs on employers. The latter simply ignores the relevant values otherwise associated with the protection of “action rights,” in either the constitutional or other analogous legal contexts.

Although notions of immutability would operate somewhat innocuously under the “de minimis” approach of *Hardison*, the heightened demands of WRFA 2003 inevitably lend them a greater significance, even as compared to their use in the disability arena. As one commentator has remarked, “one might, for instance, argue that no one chooses to be disabled, but you are able to choose your religious beliefs and practices,” although “[t]o be sure, it might be countered that one doesn’t choose one’s beliefs in the same way that one chooses a sweater.”<sup>259</sup> The Supreme Court advanced the former notion in *Estate of Thornton v. Caldor, Inc.*, when, in striking down a law prohibiting employers from requiring employees to work on their Sabbath, it rejected the “right not to work on whatever day [employ-

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255 See Clegg, *supra* note 23, at 59 (asserting that WRFA 2003 includes potentially everyone); see also 42 U.S.C. § 12,101(a) (contemplating in the introduction to the ADA the assistance to forty-three million persons).

256 Some may dispute a “redistribution” of benefits in favor of the accommodated employee, see Rabin-Margalioth, *supra* note 238, at 114, particularly when all employees are potentially covered by WRFA 2003, see Clegg, *supra* note 23, at 59, yet the heightened cost imposed on the employer is unmistakable.

257 Schwab & Willborn, *supra* note 28, at 1209.

258 42 U.S.C. § 12,111(10)(A) (“The term ‘undue hardship’ means an action requiring significant difficulty or expense . . .”).

259 See Clegg, *supra* note 23, at 59.

eels] *designate* as their Sabbath.”<sup>260</sup> In response, Professor Stephen Carter has noted that some may see it differently, such as the “Jewish people” who “have been under the impression for some 3,000 years that this choice was made by God.”<sup>261</sup> The sponsors of both the section 701(j) amendment and the Act largely seem to take the latter approach, a conclusion made most obvious by including “observance and practice” (albeit “somewhat awkwardly”)<sup>262</sup> in their definition of “religion” itself.<sup>263</sup> “Reasonable accommodation” and “undue hardship” modify these definitions, but by including “acts” in a statute (Title VII) otherwise dedicated to prohibiting “status” prejudice, inferences of immutability come quite easily.

The problem with the Act’s apparent implication of immutability is not that it is inherently wrong about the nature of religion. It may be; it may not be. Many statesmen, philosophers, theologians, and academics have been on either side of the question to one extent or another.<sup>264</sup> The problem is that it does not fit the model otherwise presented by Title VII.<sup>265</sup> Again, the issue is accommodation of action (often involving, frankly, affirmative movements), not prejudice against characteristics (including, perhaps, beliefs) beyond one’s con-

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260 472 U.S. 703, 709 (1985) (emphasis added).

261 CARTER, *supra* note 79, at 5–6 (citations omitted).

262 *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986).

263 42 U.S.C. § 2000e(j) (2000).

264 For examples of those adopting the immutability (or involuntariness) position, at least to the extent of religious belief, see Garvey, *supra* note 24, at 800 (citing Martin Luther for an involuntariness concept); Hall, *supra* note 242, at 62 (citing Thomas Jefferson and, to a lesser degree, James Madison, for the notion that religious “opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds”); and Jerry K. Robbins, *Believing for Benefit: Notes on Pascal and James*, 9 WORD & WORLD 166 (1989) (discussing Sigmund Freud’s proposal of religious beliefs as possible delusions). For examples of those adopting the mutability (or voluntariness) position, see *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) (stating that the only status regulated by Title VII that is a choice is religion); SECOND VATICAN ECUMENICAL COUNCIL, DIGNITATIS HUMANAE [DECLARATION ON RELIGIOUS LIBERTY], *reprinted in* VATICAN COUNCIL II: THE BASIC SIXTEEN DOCUMENTS 554 (Austin Flannery, O.P. ed., 1996) (teaching that “the practice of religion of its very nature consists primarily of those voluntary and free internal acts by which human beings direct themselves to God”); Jamar, *supra* note 33, at 727, 747 (“[B]eliefs and concepts are a matter of choice.”); and Robbins, *supra*, at 167–70 (presenting the religious choice theories of Blaise Pascal and William James).

265 See Engle, *supra* note 32, at 320 (arguing that, because requiring accommodation of religious beliefs forces employers to treat employees differently, Title VII’s requirement of religious accommodation is not consistent with Title VII’s requirement of equal treatment for other employee differences).

trol.<sup>266</sup> Moreover, even if these actions are rooted in an “immutable” belief, they still involve an invocation of the will with consequences that, by the very nature of the burdens imposed by the Act beyond belief or “de minimis” accommodation, impact one’s performance of the job.<sup>267</sup> Belief may be immutable, as may be the desire to engage in religious practices, but it is difficult to conclude that the engagement in the practices themselves is involuntary, akin to the *M’Naghten* or “irresistible impulse” rules in criminal law.<sup>268</sup> Whether it is Sabbath observance, prayer, grooming, proselytizing, or refraining from things contrary thereto, a volitional act, at least at some level, is required. Indeed, even if one denies the existence of free will generally, the very process of accommodation itself necessarily assumes some level of both understanding and volition on the part of both employer and employee,<sup>269</sup> a point acknowledged, at least to a limited extent, by section 701(j) itself in its use of “reasonable” and “undue” qualifiers<sup>270</sup> and by Senator Santorum’s own rejection of the prospect of being “forced to choose between keeping [one’s] faith and keeping [one’s] job” in introducing the Act.<sup>271</sup>

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266 As Professor Engle has argued, Title VII’s accommodation provisions challenge the “status-conduct distinction” that “seems firmly entrenched in the race, national origin, and sex cases.” *Id.* at 354. WRFA 2003 would only further this challenge. See Jamar, *supra* note 33, at 747 (“Employment actions taken on the basis of differences in philosophy, differences in approach to life, and differences in religious belief are qualitatively different from those taken on mere status and may be easier to justify.”).

267 See Schwab & Willborn, *supra* note 28, at 1200 (arguing that when employers are required to treat certain employees differently or more favorably, employers are being regulated in a different manner than they are under Title VII, which bans dissimilar treatment of employees).

268 The *M’Naghten* test provides that a person is not criminally responsible if he “was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” *Pollard v. United States*, 282 F.2d 450, 455 (6th Cir. 1960) (citing *M’Naghten’s Case*, 8 Eng. Rep. 718 (H.L. 1843)). “Irresistible impulse” provides that even if one knows that an act is wrong, he is still not responsible if he was, by disease of the mind, unable “to resist doing wrong or to control his acts.” WAYNE R. LAFAVE, *CRIMINAL LAW* 390 (4th ed. 2003) (citing, *inter alia*, *Parsons v. State*, 2 So. 854 (Ala. 1887)).

269 Although employees are generally not required to compromise their religious beliefs, see Kaminer, *supra* note 19, at 599–600, section 701(j) does contemplate a “process” of accommodation. See 42 U.S.C. § 2000e(j) (2000). As the Supreme Court posited in *Philbrook*, “bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.” *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (citations omitted).

270 See 42 U.S.C. § 2000e(j).

271 149 CONG. REC. S5352 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum).

Professor John Garvey argues that in the constitutional context of free exercise, lessons of cognition and volition from the *M'Naghten* "insanity" test might prove helpful in understanding religious practice.<sup>272</sup> In this sense, a religious actor might be protected because either he "did not know the nature" of his actions (cognition) or he lacked the ability "to conform" them "to [the workplace] norms" (volition).<sup>273</sup> Even Professor Garvey admits, however, that such concepts may be limited to their context, namely "retribution" of criminal law rather than free exercise vis-à-vis the state<sup>274</sup> or, for our purposes, a notion of accommodation even further removed from state power concerns. Moreover, even if a "God made me do it" rationale is at issue, the cognitive requirements of securing the accommodation right (i.e., negotiating the request), coupled with the volitional nature of exercising that right in the employment arena (i.e., actually engaging or not engaging in the activity), should lead to its rejection here. This conclusion is necessarily even stronger under an "irresistible impulse" test (i.e., volition only). Finally, given the religiosity of Americans,<sup>275</sup> it would seem somewhat of a stretch to conclude that ours is a nation of "religious insanity" (nor would Professor Garvey presumably so claim), much less that such irrationality should be subsidized by the market.

The net result of WRFA 2003's implicit treatment of religious practice as immutable or involuntary, with definitive costs associated with such treatment, would be a prohibition of what one might call "postjudice." In this sense, unlike the "prejudicial" actions regulated by the present provisions of Title VII (i.e., protection from "opinion formed" based on certain characteristics "without knowledge or examination of the facts"<sup>276</sup>), the additional requirements imposed by the Act ultimately regulate decisions made after the objective facts are known, namely those regarding the performance of the relevant job functions.<sup>277</sup> It could be argued that the ADA similarly regulates deci-

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272 See Garvey, *supra* note 24, at 798–801.

273 *Id.* at 798.

274 *Id.* at 800 ("Where retribution is not an issue . . . we may have fewer scruples about subjecting the religious claimant to the same rules that apply to everyone else.").

275 Kaminer, *supra* note 19, at 576.

276 See THE AMERICAN HERITAGE DICTIONARY, *supra* note 236, at 1384; Post, *supra* note 31, at 8.

277 See Schwab & Willborn, *supra* note 28, at 1200 (discussing how Title VII employs a sameness model requiring all employees be treated similarly, and how other laws requiring special treatment for certain employees do not fit this model). See generally 2 EEOC Compl. Man. (CCH) § 628.4, ¶ 5004, at 4183 (2003) ("[The] requirement of religious accommodation is based on a separate and distinct theory of

sions based "on the facts." However, not only do such provisions still aim to protect limitations undeniably beyond one's control,<sup>278</sup> they also do so in light of the objective proof of those limitations (e.g., medical documentation), rather than, say, the subjective testimony of a believer or a relevant religious source that, as the U.S. Supreme Court has remarked, would ultimately be "incomprehensible" to the nonbeliever—not to mention the Court itself.<sup>279</sup> In this way, the adoption of immutability could "ultimately reflect no more than a Balkanized view of the individual in a society in which common understandings are unachievable."<sup>280</sup>

In light of the foregoing mutability discussion, it should be noted that the sponsors of WRFA 2003 have given no official detailed reproof or discussion of the matter. As yet, they have offered no studies or data, nor have they developed much of any legislative record at all.<sup>281</sup> This scarcity is certainly not rare in the accommodation of re-

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discrimination."). As described in the "belief" discussion in Part V.A above (as well as notes 71 and 212), this "postjudice" can also be seen in *Hardison's* "de minimis" level of accommodation. However, once again, the higher "significant difficulty or expense" standard is what would really give tangible strength to any such notion.

278 See Jamar, *supra* note 33, at 747 (arguing that disability is an unavoidable status, unlike religious belief).

279 According to relevant EEOC ADA guidelines, "[w]hen the disability is not obvious," employers may require documentation "about the disability and . . . the functional limitations . . . from an appropriate health care or rehabilitation professional" that may even be of the employers' choosing. 2 EEOC Compl. Man. (CCH) § 902, ¶ 6908A, at 5467-8 (2003). In the religion context, "[w]hile an employer may argue that an employee's adherence to a religious practice is fraudulent [i.e., a matter of sincerity], the courts virtually never reject an employee's assertion that a need for accommodation was derived from a religious belief." WOLF ET AL., *supra* note 8, at 29. In this sense, as the Supreme Court once noted, "[r]eligious experiences which are as real as life to some may be incomprehensible to others." *United States v. Ballard*, 322 U.S. 78, 86-87 (1944), *quoted in* Garvey, *supra* note 24, at 798; *see also* *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) ("This Court cannot determine the truth of the underlying beliefs that led to the religious objections here . . ."); *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados*, 279 F.3d 49, 56 (1st Cir. 2002) ("Religious beliefs protected by Title VII need not be 'acceptable, logical, consistent, or comprehensible to others . . .'" (citing *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981))).

280 Marshall, *supra* note 40, at 36.

281 Cf. *Workplace Religious Freedom Act: Hearing on S. 1124 Before the Senate Comm. on Labor and Human Res.*, 105th Cong. 32-69 (1997) (presenting a rather limited record in support of such legislation in 1997); 149 CONG. REC. S5352-53 (daily ed. Apr. 11, 2003) (statements of Sens. Santorum & Kerry) (same for legislation in 2003). For some history of earlier versions, see 148 CONG. REC. S4865 (daily ed. May 23, 2002)



ligion field, not to mention the inclusion of religion in Title VII to begin with,<sup>282</sup> nor should it be terribly surprising given the potentially “incomprehensible” nature of the question in the first place.<sup>283</sup> Nonetheless, at a minimum, the absence of a definitive conclusion on the point does bring into doubt the wisdom of imposing certain costs for an uncertain reason, if, in fact, immutability is the theoretical basis for the Act’s proposal. Of course, as we will now explore, perhaps it does not take all the credit (or blame).

As noted above, even if mutability is conceded, a supporter of the Act might say, “even so, it’s so important we should protect it anyway”—the “personal rights” theory. In support, one might try to posit that accommodation reflects a “long history of considering religious observance a fundamental right.”<sup>284</sup> The problem with this line of argument, however, is that until 1972,<sup>285</sup> such a “right,” even if it otherwise existed, never applied to employment in any general (or, for that matter, federal) manner.<sup>286</sup> In advocating their respective amendments, both Senators Randolph and Santorum asserted the “fundamental right” of religious freedom in one way or another. For example, and as mentioned above, Senator Randolph suggested that section 701(j) is “what the Founding Fathers intended,”<sup>287</sup> while Senator Santorum opined that WRFA 2003 concerns the “first freedom” of

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(statement of Sen. Kerry); 145 CONG. REC. S11,647–48 (daily ed. Sept. 29, 1999) (statements of Sens. Kerry, Brownback & Lieberman); 144 CONG. REC. 145 (1998) (statement of Rep. Goodling); 143 CONG. REC. 24,533 (1997) (statement of Sen. Mikulski); 143 CONG. REC. 17,270–72 (1997) (statements of Sens. Kerry & Coats); 143 CONG. REC. 834–35 (1997) (statement of Sen. Kerry); 142 CONG. REC. 23,038 (1996) (statement of Sen. Kerry); and 140 CONG. REC. 28,740 (1994) (statement of Rep. Nadler).

282. See Post, *supra* note 42, at 180–81 (“The legislative history of religious discrimination under Title VII is, therefore, deeply ambiguous.”).

283. *Ballard*, 322 U.S. at 86.

284. Moberly, *supra* note 32, at 2–3 (quoting Frantz, *supra* note 227, at 206 n.8).

285. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(j) (2000)); see also Edwards & Kaplan, *supra* note 43, at 600–02 n.10 (showing that consideration of religious discrimination in congressional debates of the 1964 bill was extremely limited).

286. Cf. *Endres v. Ind. State Police*, 334 F.3d 618, 629 (7th Cir. 2003) (noting the lack of Title VII “legislative record” on religious discrimination); Edwards & Kaplan, *supra* note 43, at 600 (noting that Congress did not bother to seriously “consider or document the problem”). Indeed the discussion cited for the “fundamental right” proposition itself, see Moberly, *supra* note 32, at 2–3; *supra* note 284 and accompanying text, is largely supported by constitutional, not legislative, thought. See Edwards & Kaplan, *supra* note 43, at 602–04.

287. 118 CONG. REC. 706 (1972) (statement of Sen. Randolph).

religious exercise.<sup>288</sup> As laudable as these aspirations may seem, there is simply no historical support to them as applied to the workplace, not to mention any "significant" accommodation therein.<sup>289</sup>

Despite the lack of a particular historical pedigree to the "personal rights" theory in employment, one might still argue that, nevertheless, the theory is supported by similar treatment of a range of other rights that, while admittedly based on mutable or volitional activity, nevertheless provide protection in the marketplace. Examples of such "act-based" protections include collective labor action,<sup>290</sup> military service,<sup>291</sup> jury duty,<sup>292</sup> family leave,<sup>293</sup> whistleblowing,<sup>294</sup> and, although not protected on the federal level but in many states, marital status.<sup>295</sup> The problem with this argument, however, is that each of the foregoing involves a more direct (and, dare say, substantial) "state interest" apart from the exercise of the particular individual right at issue. For example, jury duty is protected for "the maintenance and

288 149 CONG. REC. S5353 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum).

289 In fact, as described below, there is little historical basis for even using these arguments in support of accommodation in the *constitutional* realm. See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (denying "remedial" basis for Congress to impose RFRA religious exemptions on applicable state laws); *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990) (citing "constitutional tradition" in rejecting religious exemptions from state narcotics law); *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (denying religious exemptions from federal polygamy law); *Endres*, 334 F.3d at 629–30 (discussing distinction between constitutional "neutrality" and Title VII "accommodation").

290 See National Labor Relations Act, 29 U.S.C. § 158(a)(3) (2000).

291 See Uniformed Services Employment and Restoration Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4311–4319 (2000). USERRA contains both "reasonable" and "undue hardship" qualifiers on the "accommodation" of reinstatement following military service. *Id.* at § 4312(d)(1).

292 See Jury Systems Improvement Act, 28 U.S.C. § 1875 (2000) (prohibiting discrimination against jury service, and essentially guaranteeing treatment as if on leave).

293 See Family and Medical Leave Act of 1993, 29 U.S.C. § 2614 (protecting, among other things, leave to attend to a sick relative (i.e., volitional at least as to employee)).

294 See, e.g., 29 U.S.C. § 1140 (retaliation under Employee Retirement Income Security Act of 1974); 42 U.S.C. § 2000e-3 (2000) (outlining Title VII retaliation provision); ESTREICHER & HARPER *supra* note 25, at 728 ("Virtually every federal health and safety law contains an antiretaliation provision . . .").

295 See, e.g., CAL. GOV'T CODE § 12,940 (West 1992 & Supp. 2003); MD. ANN. CODE art. 49B, §§ 14, 16(a)(1) (Michie 2003); MICH. COMP. LAWS ANN. § 37.2202 (West 2001); N.J. STAT. ANN. § 10:5-12 (West 2002); N.Y. EXEC. LAW § 296(1)(A) (McKinney 2001); VA. CODE ANN. § 2.2-3900 (Michie 2001); cf. CASTAGNERA ET AL., *supra* note 36, ¶ 10,020 ("[Although federal law does not forbid marital discrimination directly,] an employer's rule which forbids or restricts the employment of married women, but which does not affect the employment of married men constitutes sex discrimination, according to the EEOC.").

independence of the judicial system,"<sup>296</sup> family leave to "dismantle persisting gender-based barriers" in leave policies,<sup>297</sup> and collective labor activity for "industrial peace."<sup>298</sup> Moreover, of those listed above, only military service imposes a "significant difficulty or expense" accommodation test,<sup>299</sup> with the high level state interest in that area rather self-evident.

Although arguments concerning a state interest in religious pluralism have been raised since the Founding,<sup>300</sup> such an interest is not reflected in any findings under the Act and has been asserted in support only in passing.<sup>301</sup> Furthermore, no such state interest (as opposed to individual) has been raised that rises to the level of those actions described above that are otherwise protected by federal law in the workplace. Even leaving constitutionality aside, the primary state interest (or "secular purpose") of the Act would presumably be the same as that of "de minimis" section 701(j), namely, the "elimination of discrimination in the workplace."<sup>302</sup> As discussed in the previous

296 CASTAGNERA ET AL., *supra* note 36, ¶ 10,032 (quoting *Lucas v. Matlack, Inc.*, 851 F. Supp. 225, 228 (N.D. W. Va. 1993)).

297 *Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1981 n.10 (2003).

298 *NLRB v. Americare-New Lexington Health Care Ctr.*, 124 F.3d 753, 758 (6th Cir. 1997).

299 *See* 38 U.S.C. § 4312(d)(1) (2000).

300 *See* THE FEDERALIST NO. 10 (James Madison), *cited in* *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) (proposing that "the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects").

301 With regard to "pluralism" as a state interest, Senator Santorum asserted that "religious pluralism is one of the great strengths of this country," yet he focused on "freedom of conscience" and "freedom to exercise one's religion." 149 CONG. REC. S5352-53 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum). Similarly mixed, yet individual-focused statements have been made in support of earlier versions of the Act. *See, e.g.*, 145 CONG. REC. S11648 (daily ed. Sept. 29, 1999) (statement of Sen. Lieberman) (noting that America "is a deeply religious nation," yet focusing on the "ability to worship freely"); 143 CONG. REC. 17,271-72 (1997) (statement of Sen. Coats) (citing notion of "religious faith enrich[ing] our common life," yet focusing on "avoiding the cruel choice of surrendering their religion or their job"); *see also* 143 CONG. REC. 24,533 (1997) (statement of Sen. Mikulski) (focusing exclusively on "religious accommodation" as "a cherished right").

302 *EEOC v. Ithaca Indus.*, 849 F.2d 116, 119 (4th Cir. 1988) (discussing the "secular purpose" of section 701(j)). In her concurring opinion in *Estate of Thornton v. Caldor, Inc.*, Justice O'Connor seemed to refer to both "pluralism" and nondiscrimination in stating, "[i]n my view, a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society." 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 90 n.4 (1977) (Marshall, J., dissenting)).

Part, such a strictly antiprejudice purpose is rather dubious in light of the "significant" benefits afforded by the Act to the religious practitioner.<sup>303</sup> In a similar manner, even if pluralism were to ultimately replace nondiscrimination as the operative state interest, its method (and even, perhaps, its goal) of free competition and equal treatment would also conflict with the model advocated by the Act.<sup>304</sup>

In addition to mutability and "personal rights" issues, a final theoretical concern with the "significant difficulty or expense" standard proposed by WRFA 2003 is that it is inconsistent with analogous church-state jurisprudence in the constitutional arena. This conflict can be seen in two ways. First, the Act contradicts the "neutrality principle" (or "equal treatment" principle) that pervades the present Supreme Court's approach to First Amendment issues,<sup>305</sup> including issues involving "accommodation" by the government itself,<sup>306</sup> at least for state law purposes.<sup>307</sup> Second, the Act's accommodation proposal

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303 See also *Endres v. Ind. State Police*, 334 F.3d 618, 630 (7th Cir. 2003) (noting that "neutrality [that is] necessary to avoid disparate treatment . . . differs substantially from accommodation"). In fact, even when referring only to the "stingy application by the Supreme Court" of the current section 701(j), Kent Greenawalt has commented that "I do not believe the language of Title VII's accommodation section . . . can be justified as a simple anti-discrimination law." Kent Greenawalt, *Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1, 23-24 (2001).

304 See *Lyng*, 485 U.S. at 452 (citing "competition" as the pluralism method in a "diverse society," even in the constitutional context).

305 Neutrality is a critical element in jurisprudence under the Free Exercise Clause, see, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . .'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982))); cf. *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 232-33 (2000) (stating that "viewpoint neutrality" insulates the state from a First Amendment challenge), and the Establishment Clause. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 838 (2000) (O'Connor, J., concurring) ("[W]e have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding government programs in the face of Establishment Clause attack is their neutrality towards religion.").

306 See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Smith*, 494 U.S. at 878.

307 It should be noted that in rejecting the challenge to *Smith* posed by RFRA, 42 U.S.C. § 2000bb (2000), the Court in *City of Boerne* only rejected the application of RFRA's "compelling interest" to state zoning law, see *City of Boerne*, 521 U.S. at 536, not necessarily to the federal law. See *Guam v. Guerrero*, 290 F.3d 1210, 1219 (9th Cir. 2002) ("The U.S. Supreme Court declared RFRA unconstitutional as applied to the states . . ."); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1120 (9th Cir. 2000) ("We have held, along with most other courts, that the Supreme Court invalidated RFRA only as applied to state and local law."), cert. denied, 532 U.S. 958 (2001). Thus, as indicated above, see *supra* note 35, RFRA's requirement of a

runs counter to the act-status (or belief-practice) distinction deemed critical by the Court in distinguishing between improper intentional discrimination against religion generally and permissible ancillary burdens to religious practice.<sup>308</sup>

As the Supreme Court opined in *Smith*, "if prohibiting the exercise of religion is not the object of the [relevant state action] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."<sup>309</sup> Otherwise, as the Court asserted over a century ago in the landmark polygamy case of *Reynolds v. United States*, religion based exceptions to neutral, generally applicable laws would "permit every citizen to become a law unto himself."<sup>310</sup> Moreover, as it posited further in the federal highway case of *Lyng v. Northwest Indian Cemetery Protective Ass'n*, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."<sup>311</sup>

In church-state jurisprudence, the intended target is the *intentional* discrimination of religion,<sup>312</sup> not a failure to accommodate its practices.<sup>313</sup> As Judge Learned Hand once noted in distinguishing discrimination from accommodation in this context, "[t]he First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities."<sup>314</sup> Professor Carter explains the concept of neutrality further: "Neutrality treats religious belief as a matter of individual choice, an aspect of conscience, with which the government must not interfere but which it has no obligation to respect."<sup>315</sup> Although this jurispru-

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"compelling state interest" might apply to relevant federal workplace rules, although the Senate Report suggests otherwise. Rosenzweig, *supra* note 35, at 2526.

308 See *City of Boerne*, 521 U.S. at 535 ("When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs."); *Smith*, 494 U.S. at 877-79 (finding that "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status," but may enact "generally applicable" laws that have only an "incidental effect" on religious practice).

309 *Smith*, 494 U.S. at 878.

310 98 U.S. 145, 167 (1878).

311 485 U.S. 439, 452 (1988).

312 See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible.").

313 See *City of Boerne*, 521 U.S. at 529-31.

314 *Ottens v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953), quoted in *Edwards & Kaplan*, *supra* note 43, at 599; see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (quoting the same Hand passage).

315 CARTER, *supra* note 79, at 134.

dence is not directly on point (except perhaps to the extent that the "significant difficulty or expense" standard itself might be constitutionally suspect),<sup>316</sup> it provides remarkable insight into the constitutional approach to the relevant issues, an approach that is marked by neutrality and equal treatment, rather than by special accommodation and affirmative action.<sup>317</sup>

Upon constitutional reflection, one cannot help but confront the conclusion that what seems to be the law for the state generally might not be the law for employers under the Act.<sup>318</sup> Curiously, it is possible that the First Amendment itself could be to blame. However one views this result as a normative matter, it places not only the comments on "religious freedom" by both Senators Randolph and Santorum, but also the question of the entire approach to be taken by the Act on such matters,<sup>319</sup> in a very interesting light.

### C. *Rights, Ideas, and the Marketplace*

As Judge Learned Hand commented further in the *Ottens* case cited above, "[w]e must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfactions from within, or our expectations of a better world."<sup>320</sup> The approach taken by the Act is, of course, antithetical to Judge Hand's approach, and similarly, through its "de minimis" accommodation standard, that taken by the Court in *Hardison*. This is not to suggest that voluntary employer accommodation, either on its own initiative or as the result of bargaining, collective or otherwise, is neither desirable nor commendable. Rather, it is a matter of state power and

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316 See *supra* note 23 and accompanying text.

317 One might argue that "neutrality" is inoperative in the Court's own "accommodation" in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 339 (1987), of the exemption for religious employers from the religion provisions of Title VII under section 702. See 42 U.S.C. § 2000e-1 (2000). Although this argument is logical, it ignores both the potential entanglement of church and state and the distinction between state and private regulation of religious exercise. See *Amos*, 483 U.S. at 337-38 ("For a law to have forbidden 'effects' . . . the government itself [must advance] religion through its own activities and influence.").

318 Again, as discussed above, see *supra* note 35, even WRFA 2003's very application to state and local employers is jeopardized by the "neutrality principle" holding in *City of Boerne*, 521 U.S. at 530.

319 See 149 CONG. REC. S5353 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum); 118 CONG. REC. 706 (1972); Engle, *supra* note 32, at 320 (noting that Title VII requires employers to accommodate the religious beliefs of employees).

320 *Ottens v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953), quoted in Edwards & Kaplan, *supra* note 43, at 599.

the limits of individual rights, and the "significant difficulty or expense" standard of religious accommodation proposed by the Act may very well infringe upon an opportunity that would be best left in the hands of the marketplace, one not only of business but of ideas as well.

Professor Mary Ann Glendon has argued in emphasizing the dangers of a culture defined solely by individual rights, without any notion of duties or concepts of community, that "[o]ur rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground."<sup>321</sup> Although perhaps speaking to a different end, Professor Jamar has noted that "[s]ociety is to be ordered and truth is to be ascertained through the tugs and shoves of thoughts in the marketplace of ideas."<sup>322</sup> Indeed, if religion really is "incomprehensible" to the nonbeliever<sup>323</sup> and "need not be 'acceptable, logical, consistent, or comprehensible to others,'"<sup>324</sup> or something about which even the Supreme Court itself cannot "determine the truth,"<sup>325</sup> why not permit an otherwise free market (that ostensibly already strives to eliminate *irrational* prejudice against beliefs, status, or practices,<sup>326</sup> and strives for freedom from the coercive power of the state)<sup>327</sup> to deal neutrally and equally with the actions of all of its participants, whether religious or not. That, in fact, is the very principle that lies at the "core" of not only relevant American economic and constitutional systems generally,<sup>328</sup> but more particularly, the further enhancement thereof through the antidiscrimination principles of Title VII itself.<sup>329</sup>

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321 MARY ANN GLENDON, *RIGHTS TALK* 14 (1991).

322 Jamar, *supra* note 33, at 728.

323 *United States v. Ballard*, 322 U.S. 78, 86 (1944).

324 *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarilados*, 279 F.3d 49, 56 (1st Cir. 2002) (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981)).

325 *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

326 See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); Post, *supra* note 31, at 8.

327 See Marshall, *supra* note 40, at 20 (noting that one of the justifications for the First Amendment is that an effort by government "to coerce belief . . . is the hallmark of a feudal or totalitarian society") (quoting THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 21 (1970)).

328 As Professor Marshall notes, "[t]o the framers, [free interchange] and mutual understanding had value not only because of its role in persuading others or in being persuaded, but also because it was seen to be of inherent worth . . . ." Marshall, *supra* note 40, at 37.

329 See Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1707 (1988) (discussing the "core prohibition of Title VII against

In attempting to resolve the accommodation question, reflections on John Stuart Mill's "marketplace of ideas" theory, and its limitations, might prove helpful (although distinctions of state versus private and belief versus action must be recalled given that the ideas offered by Mill and others in this area generally concerned "public speech," not "private action," not to mention the accommodation thereof). In this, Mill argued that silencing individual expression hinders the advancement of a free people, for "if the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."<sup>330</sup> This well known notion echoes throughout the history of "free speech" thought, from Thomas Jefferson ("public judgment will correct false reasonings and opinions, on a full hearing of all parties")<sup>331</sup> to Oliver Wendell Holmes ("the best test of truth is the power of the thought to get itself accepted in the competition of the market")<sup>332</sup> to the Supreme Court itself in its reflections on James Madison's *The Federalist* No. 10 ("the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects").<sup>333</sup>

Of course, the foregoing is not intended to suggest that the "marketplace of ideas" theory is without limits or its host of critics.<sup>334</sup> In fact, even Mill himself once remarked that "the dictum that truth *always* triumphs over persecution" is "one of those pleasant falsehoods."<sup>335</sup> Nevertheless, whatever conclusions one makes on the "marketplace" theory of speech within the public square, it is in-

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an employer who discriminates against adherents of particular religions purely for invidious reasons").

330 JOHN STUART MILL, *ON LIBERTY* 16 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859).

331 Kevin Francis O'Neill, *Muzzling Death Row Inmates: Applying the First Amendment to Regulations that Restrict a Condemned Prisoner's Last Words*, 33 ARIZ. ST. L.J. 1159, 1184 n.169 (2001) (quoting Thomas Jefferson's second inaugural address in SAUL K. PADOVER, *THOMAS JEFFERSON AND THE FOUNDATIONS OF AMERICAN FREEDOM* 132 (1965)).

332 *Id.* at 1184 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

333 *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) (citing *THE FEDERALIST* No. 10 (James Madison)).

334 See, e.g., O'Neill, *supra* note 331, at 1184 n.172 (citing, inter alia, Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979): "[T]oo many false ideas have captured the imagination of man.").

335 JOHN STUART MILL, *ON LIBERTY* 89 (Pelican Classics 1980) (1859) (emphasis added), quoted in Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 765 (2000).



sightful to reflect on the resultantly narrower position taken (intentionally or not) by WRFA 2003, not only as to workplace speech itself, but also to religious conduct generally.<sup>336</sup> As Professor Jamar has observed, "[t]hese assertions of individual rights could exacerbate declining social harmony," thus implicating community and state interests as well.<sup>337</sup>

Thus, the "marketplace of ideas" perspective on WRFA 2003 exposes a conflict between relevant assertions of individual "rights" of significant accommodation and the development of a general culture of freedom and equality. More specifically, however, it also provides an important perspective on the various players in the drama, namely the employees, the employer, religion, and the state. For the individual, the Act seemingly provides much promise in affording greater rights in one's engagement in religious activities. The "marketplace" problem, though, is that not only do these "rights" place their bearer in a possible haven that might risk one's ultimate growth in "truth,"<sup>338</sup> but also such "rights" under the Act's accommodation standard contemplate a special treatment that may not be shared by other "individuals" (e.g., coworkers).<sup>339</sup>

As far as employers are concerned, the most obvious consequence of the Act is a heavier burden, whether administratively, financially, and/or operationally. In the realm of ideas and rights, however, the Act also imposes great costs. At least in the private workplace, both employer and "employee have the right to exercise their religious beliefs and . . . one or the other must either give way completely or one or the other or both must give way partially through accommodation."<sup>340</sup> Moreover, the duty that an employer has to other employees in the form of maintaining a workplace free from

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336 See Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL'Y 959, 979-83 (1999) (discussing both religious speech and religious conduct generally in light of an earlier version of WRFA 2003).

337 Jamar, *supra* note 33, at 725.

338 See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas . . .").

339 See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977) (holding that preferential treatment cannot be given to employees because of their religious beliefs).

340 Jamar, *supra* note 33, at 724-25. Further heightening this conflict, Professor Jamar opines that "[t]he religious freedom interests of the employer and the employee are both of the first magnitude." *Id.* at 727.

religious hostility (typically through proselytization) may also be severely compromised.<sup>341</sup>

Finally, in terms of the relationship between church and state, the Act proposes a radical vision. On the state side, the neutrality otherwise espoused under a "marketplace of ideas" theory of the First Amendment would be undercut by the Act's promotion of religious activity in the workplace. In fact, even if one were to accept the pedigree of "a wall of separation between Church & State," a history brought into extreme doubt by the recent scholarship of Professor Philip Hamburger,<sup>342</sup> such meddling in religion, even on a "neutral" basis, would seem inconsistent with such a theory of separation. At the practical level alone, the terms of the Act would demand a judicial assessment of religious issues (e.g., sincerity) on a scale that has never been seen before. On the church side, the great political philosopher Alexis de Tocqueville once warned of the risks of religion's reliance on the "artificial strength of laws."<sup>343</sup> Under the Act, this "artificial" insulation from the consequences of the marketplace may ultimately lead to the spiritual atrophy that typically results from a state's indulgence of religion.

In sum, the accommodation standard of WRFA 2003, in focusing on the "tree" of individual rights, seems to miss the "forest" of the placement of such rights in the larger community. This placement not only risks adverse consequences for others, but poses substantial harms to the individual as well. As Professor William Marshall once observed in the First Amendment context, "[t]he search for truth theory emphasizes freedom and autonomy consonant with liberalism, yet reins in many of the excesses of individualism by suggesting, in accord with principles of civic virtue, that the individual may be bound by concerns beyond her self-interest."<sup>344</sup> Thus, the cost of accommodation under the Act may be even greater than an employer's "significant difficulty or expense."

## CONCLUSION

In closing, it is the status quo mixture of nondiscrimination and "de minimis" accommodation (with anything beyond that being en-

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341 See DelPo, *supra* note 45, at 349 (noting that an employer accommodating employee proselytizing risks harassment claims from other employees).

342 See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 481 (2002) (concluding that "the constitutional authority for separation is without historical foundation").

343 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 297 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1969) (1835).

344 Marshall, *supra* note 40, at 34.

tirely voluntary)<sup>345</sup> that best suits the relevant balance between individual religious rights and the common good. The essential division between status and action that presently operates through the “prejudice model” not only properly fulfills the objectives of Title VII, but also respects all relevant interests at stake. Employees are protected from irrational decisions based on matters arguably beyond their control, employers are afforded discretion appropriate to the operation of a free and fair market, the rights of coworkers are safeguarded, and the interests of church and state are addressed in a spirit of neutrality and equal treatment.

By its “significant difficulty or expense” test, WRFA 2003 would fundamentally disrupt the present balance. In encouraging a model of immutability for religious action and/or imposing an unprecedented theory of personal rights, the Act holds much danger for employers, employees, religion, the state, and society generally. The economic costs of the Act (which, once again, could cover up to 147 million persons) are not at all clear, nor have its supporters put forth a figure.<sup>346</sup> Yet, whatever they are, the cost to authentic religious liberty within a free economy would be far greater. In the end, the level of affirmative action demanded of employers by the Act simply cannot stand.

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345 Indeed, even as Senator Santorum himself acknowledges, “most private employers” already voluntarily accommodate. 149 CONG. REC. S5352 (daily ed. Apr. 11, 2003) (statement of Sen. Santorum).

346 See, e.g., *id.* at S5352–53 (statements of Sens. Santorum & Kerry).